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THE UNIVERSITY OF ALBERTA

The Crown Prosecutor In Alberta: An Unfinished Hybrid

by

©

Marvin R. Bloos

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN
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MASTER OF LAWS

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EDMONTON, ALBERTA
FALL, 1987

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled The Crown Prosecutor in Alberta: An Unfinished Hybrid submitted by Marvin R. Bloos in partial fulfilment of the requirements for the degree of MASTERS OF LAWS.

James C. Robb, Supervisor

Dr. Desmond H. Brown

Peter J.M. Lown

Date August 24, 1987

I dedicate this thesis to my wife Doreen and to my children Rebecca, Elisa, and Joshua, who have so patiently gone without a husband and father for so long.

Thankyou, I love you.

ABSTRACT

In Canada the procedure by which criminal offences may be prosecuted is defined by the *Canadian Criminal Code*. Much of that procedure is based upon English common law and legislation adapted for use in the Canadian context. It has commonly been assumed that Crown prosecutions in Alberta are conducted in the same manner as they have been in England but that is not correct. Historically England never had a public prosecutor or a system of public prosecutions similar to the one now employed in Alberta. In England, until the passage of the Prosecution of Offences Act 1985, most criminal prosecutions were in law private ones in which the Attorney General or his agents took no part. While the English Attorney General might have supervised or conducted criminal prosecutions as is now purportedly done in Alberta, he never did so and counsel prosecuting on behalf of the Crown were not agents of the Attorney General but were acting upon the instructions of their client, the private prosecutor.

Although the criminal law and procedure employed in Alberta is steeped in the traditions of British common law, the public prosecutions model is not. It is a hybrid of Scottish and Canadian colonial practice superimposed upon a *Criminal Code* which procedurally, was founded upon a scheme of private prosecutions. Although the Attorney General of Alberta enjoys the same authority and prerogatives as the English Attorney General to prosecute crime on behalf of the state, as matters are now constituted, his agents do not. Whereas full-time agents of the English Director of Public Prosecutions (for whom the Attorney General is responsible) are authorized by specific legislation to prosecute on behalf of the Crown, similar legislation does not exist to empower full-time Crown prosecutors in Alberta. When Alberta's Attorney General appoints full–time agents, he purports to give them a general delegation of his authority to prosecute indictable offences. Neither the *Criminal Code* or provincial legislation authorizes that practice and Canadian courts have consistently disallowed such a procedure. Therefore when local Crown prosecutors in Alberta purport to prosecute on behalf of the Attorney General, they do so without authority.

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I. INTRODUCTION

A. The Purpose

Pursuant to section 92(14) of the Constitution Act 1867 the government of Alberta is given constitutional authority over the administration of criminal justice in the province. The Department of the Attorney General Act[1] establishes the office of the Attorney General[2] and charges him with the superintendence of the administration of justice in the province.[3] By section 2(e)[4] the Attorney General is granted authority to "exercise the powers and is charged with the duties attached to the office of the Attorney General of England by law or usage in so far as those powers and duties are applicable to Alberta."

In order to carry out the duties and jurisdiction of the Attorney General, the Department of the Attorney General employs staff lawyers[5] to prosecute *Criminal Code* offences[6] on behalf of the Attorney General. Accordingly, every major centre in Alberta has a Crown prosecution's office staffed by lawyers employed by the Attorney General's Department to provide prosecutorial services.[7]

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[1] R.S.A. c. D-13.

[2] Ibid., s. 1.

[3] Ibid., s. 2(c).

[4] Idem.

[5] Ibid; see s. 2(j)(vii) for the Department's authority to hire prosecution's staff. *The Annual Report of the Attorney General of Alberta 1983*, the last year for which complete figures are given, indicates that there were a total of 244 lawyers in the Criminal Law Division. The *Annual Report* for 1985–86 suggests the total number may now be approximately 200 with 124 of those being directly involved in criminal prosecution work.

[6] All references to "criminal code offences" are to the applicable provisions of the Criminal Code of Canada first enacted in 1892, and as amended or revised since that time and referred to hereafter as the *Criminal Code*.

[7] *The Annual Report of the Attorney General of Alberta, 1985–86*, lists 13 centres where offices are located (con't)

This paper does two things; first it examines the history of Crown prosecutions in England and pre-confederation western Canada, second, it will examine the authority and jurisdiction of the Crown lawyers working for the Department of the Attorney General to prosecute *Criminal Code* offences in Alberta. Certain events have recently raised major issues concerning the authority, and the degree to which the Attorney General of Alberta may influence and direct the activities of Crown lawyers employed to prosecute criminal offences. These events, which are described below, raise very timely issues which are the subject of this thesis.

The Irving Committee

In February of 1984, the Canadian Bar Association appointed a committee chaired by Mr. H. L. Irving Q.C. to investigate certain aspects of the Attorney General's department.[8] The inquiry was sparked by two developments which became the subject of public comment and resulted in criticism of the Attorney General and the operations of his department.[9] The first incident concerned certain memorandums and correspondence[10] which were exchanged between the Deputy Attorney General and police departments in Alberta concerning the policy to be followed in the investigation of Government employees suspected of crime.

The second affair concerned the decision of the Attorney General, on the advice of his senior staff, not to prosecute certain officers of the Dial Mortgage Company on charges

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including Edmonton, Calgary, Lethbridge, Grande Prairie, Red Deer, Drumheller, Medicine Hat and six others.

[8] The Committee was not given a title and is generally referred to as the Irving Committee.

[9] See pp. 16 and 24 of the report which was entitled, "Report To Canadian Bar Association, Alberta Branch, Following Review Of Administrative Policies, Directives, Practices, And Procedures In The Attorney General's Department Relating To Criminal Investigations And Prosecutions", referred to hereafter as the Irving Report.

[10] Ibid, these materials may be found set out on pp. 16-29 of the report.

of fraud. There had been a lengthy investigation by senior members of the Royal Canadian Mounted Police who had recommended that charges be laid. One of those investigated but not prosecuted was a senior civil servant. Stories about the investigations policy issue and the decision not to prosecute were published in the press together with allegations of political interference in the operations of the Attorney General's department.[11]

As a result of the controversy surrounding the Attorney General, the Canadian Bar Association established the Irving Committee to review the situation.[12] On September 5th, 1984 the committee submitted its final report.

The committee's two key terms of reference were;

1. To review administrative policies, directives, practices and procedures in the Attorney General's Department relative to the functioning of the Department in criminal investigations and prosecutions; and
2. To suggest any changes that the Committee felt were warranted.[13]

Two issues surfaced very early in the report and became dual themes throughout. The first concerned the professional tightrope the Attorney General must walk as an influential and senior political member of the government, which must be balanced with the traditional role of the Attorney General, as the Monarch's legal representative[14] in Crown prosecutions. The latter role requires the Attorney General to remain free of political pressures and partisan considerations when making prosecutorial decisions,[15] which is not the case when she or he is carrying out their duties as a political Minister of the government.

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[11] Ibid, p. 43.

[12] Ibid, p. 1, other issues were also considered in the report including private complaints and questions concerning environmental prosecutions.

[13] Ibid, p. 1.

[14] Ibid, pp. 53, 54.

[15] Ibid, see pp. 5-9, 59.

The second issue concerned problems arising out of the centralization of the department that had taken place because of the large and recent increases in full–time prosecutorial staff.[16]

Concerning the first issue, the committee recommended that as nearly as possible, the Attorney General should divorce himself from active involvement, or the appearance of active involvement in the daily operations of the Criminal Justice division and confine himself to broad policy issues.[17] Recognizing that the Attorney General is the political member of the executive responsible for the administration of justice in the province and therefore of criminal prosecutions, it further recommended that a Director of Public Prosecutions be established who would be responsible for the day to day operations of the Criminal Justice division. That person would be responsible directly to the Attorney General.[18]

When dealing with the second issue, the Committee found that on the plus side, centralization had "achieved one important goal of the proper administration of justice, that is, a uniformity of approach and policy which is necessary to ensure fairness to those affected by it."[19] However the Committee also found that the uniformity had been achieved at the expense of the second important goal, which was the independence of decision making traditionally exercised by the Crown prosecutor.[20] Among other things, the committee recommended that all the policy directives and guide-lines issued to the Crown prosecutors be reviewed and revised and that it be made clear that the policies were guides only[21]—the Crown prosecutor was ultimately to be free to make final decisions exercising an independence of decision-making which was seen as a fundamental part of the job.[22] The Committee concluded that while the prosecutor must be accountable to the Attorney General, in practice that should mean no more than" he must always be able to show the factors considered in the exercise of his discretion."[23]

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[16] Ibid, see pp. 5-39. The *Annual Report* of The Attorney General of Alberta for 1975, 1977, 1979, 1981 and 1983 indicates that the full–time prosecutions staff of the Criminal Justice Division beginning with 1975, were; 49, 97, 121, 123, and 244 respectively. See also n. 5 *supra.*

[17] Ibid, pp. 8, 9, 59.

[18] Idem.

[19] Ibid, p. 6.

[20] Ibid, see also pp. 5-39.

The Unresolved Issues

By law and custom in England, Attorneys General appointed counsel to conduct prosecutions on their behalf in those matters for which the Attorney General could not appear personally. Lawyers so appointed came to be called Crown counsel. In conducting those prosecutions, and again by law and custom, the Crown prosecutor was entitled to exercise some of the authority and certain of the privileges of the Attorney General.[24]

The prosecutorial authority and privileges traditionally exercised by the Attorney General of England now devolve upon the Attorney General of Alberta by the terms of the Attorney General Act.[25] It must be noted however, that England never had a system of public prosecutions similar to the system now employed in Alberta, a major point which is missed by the Irving Committee.[26] The report makes it clear that the Committee assumed the relationship between the Attorney General and the Crown prosecutor was a "traditional" one and the committee did not endeavour to define what that traditional relationship was.[27] For example the Irving Committee did not examine the legal relationship between the Attorney General and full-time Crown prosecutors to determine whether in law it was the same as the one which existed between the Attorney General of England and his agents. This is a crucial issue given the provisions of s. 2(e) of the Department Of The Attorney General's Act which defines the authority of the Attorney General in terms of the powers, duties, and usage of the Attorney General of England.[28]

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[21] Ibid, p. 58.

[22] Ibid, pp. 6, 7, 8, 31, 58.

[23] Ibid, p. 56. It should be noted that the Committee, having examined at length the issues concerning the Department's investigations policy (pp. 16-27) and the Attorney General's decision not to prosecute made in the Dial Mortgage affair, (pp. 43-48) found neither improper motives nor political interference to be involved in the matters.

[24] Ibid, p. 54. See also J.Ll.J. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), which fully describes the traditional role of the Attorney General of England as chief Law Officer of the Crown and his relationship to those appointed to prosecute on his behalf.

[25] The Department of the Attorney General Act, R.S.A., c.D-13, s. 2(e).

Some Canadian jurisdictions have legislation defining the duties of the full–time prosecutor when acting on behalf of the Attorney General.[29] Alberta does not have such legislation. Therefore, if the relationship between the Attorney General and the prosecutors in his department is to be fully understood, that understanding can only be achieved through an historical examination and analysis of the office of Attorney General and its relationship to criminal prosecutions.

Through a review of the historical development of prosecutorial powers and of relevant legislation and case law, it will be shown that with respect to *Criminal Code* offences there are two types of prosecutors in Alberta;

1. public prosecutors employed full–time by the Department of the Attorney General supplemented by lawyers in private practice who are retained on an occasional basis by the Attorney General and given specific authorization to prosecute particular offences,

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[26] Criminal prosecutions in England, until 1986, were in law private prosecutions. The English system of prosecutions is discussed at length in Chapter III.

[27] Ibid, see particularly pp. 7-9, 30-32, and 59-60.

[28] R.S.A., c. D-13.

[29] See Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986), p. 157-164, for a review of the legislation which exists in all Canadian jurisdictions.

and

2. private citizens who are given a limited legislative authority to prosecute offences.[30]

This review will establish that in the absence of specific legislation, the public prosecutor who prosecutes without specific authorization from the Attorney General for each particular case, has no greater authority than a private citizen, and is subject to the same legislative restrictions.

The historical background will demonstrate that the system of employing full–time prosecutors in Alberta is a hybrid influenced by English, Scottish and colonial developments. As well, it will show that the present full–time Crown prosecutor in Alberta, when purporting, as agent of the Attorney General, to prefer and then prosecute criminal code offences by indictment, is exercising authority which is of dubious legal validity. These issues which are of fundamental importance when inquiring into the role of the full-time Crown prosecutor in Alberta were not dealt with by the Irving Committee in its report.

B. Definition Of Terms

Various terms describing the same thing or activity have been employed in the different historical periods and jurisdictions referred to in this thesis. To avoid confusion, a list of key terms and their definitions as used in this paper are provided below:

Attorney General; refers to the chief Law Officer of the Crown in the national or provincial jurisdiction for which he or she is appointed and is the Monarch's legal representative in all matters affecting the interests of the Monarch or the state.

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[30] In s. 2 of the *Criminal Code*, R.S.C. 1970, c. C-34, "prosecutor" is defined as, "the Attorney General, or where the Attorney General does not intervene, means the person who institutes proceedings to which this act applies, and includes counsel acting on behalf of either of them." Sub-section 720(1), which only applies to summary conviction proceedings, defines prosecutor as meaning "the Attorney General, or where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them"; the same section defines informant as one "who lays an information". There are certain limitations placed on the right of a private citizen to prosecute—these are reviewed in Stenning, *Appearing for the Crown*, *supra* n. 29 at pp. 263-271.

Crown; refers to the King or Queen in their public capacity as the body politic; in the modern Canadian and provincial context, it means the executive government.[31]

Crown prosecutor; refers to one who has been hired by the Attorney General or his department to conduct criminal prosecutions on behalf of the Attorney General.

Private prosecutor; refers to any private citizen who exercises his right to act as a prosecutor.[32]

Prosecutor; refers to one who initiates and conducts, personally or through a lawyer, criminal court proceedings against another.

Prosecution system; refers to the system of courts, officials, procedures and laws established by the Crown to facilitate prosecutions by either a public or private prosecutor.

Public prosecutor; refers to one who is a public official[33] and who, as part of his public duties, regularly initiates or conducts criminal prosecutions on behalf of a private citizen,or the police.

C. Scope Of The Thesis

As noted, the Irving Report left certain important issues unexamined or unresolved.[34] This thesis will be concerned with the full–time Crown prosecutor and the prosecution system in Alberta. While other provincial schemes will be referred to, only that of Alberta will be given detailed examination.

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[31] For a discussion of the modern meaning and usage of "Crown" in Canada, see Peter W. Hogg, *Constitutional Law of Canada*, (2nd ed.) (Toronto: Carswell Co., 1985), p. 215 ff.

[32] Any person in Canada may prosecute a Criminal Code offence, see footnote 30 *supra*.

[33] Between the sixteenth and eighteenth centuries in England, the Justice of the Peace acted in the capacity of a public prosecutor. This subject will be taken up in Chapter III below.

[34] For example the historical development of the Crown prosecution system in Alberta or the customary or common law relationship between the Attorney General and prosecutors working for his department.

The paper will focus primarily upon the Crown prosecutor's authority to prosecute criminal offences pursuant to the provisions of the *Criminal Code of Canada*, because it is that authority or its lack which raises the most contentious issues.[35]

D. Structure

In Chapter II, the origin of the Crown interest in prosecutions and the initial development of the prosecution system in England up to the sixteenth century will be outlined. Note will be made of changes in the method of prosecution over time, beginning with the "appeal of felony", the medieval equivalent of an action in tort, to the system of "pleas of the Crown" by which the Crown became the nominal prosecutor (and chief beneficiary of any proceeds resulting from conviction). Consideration will be given to the introduction of and changes to the jury of presentment, or grand jury system, which gave rise to trial by jury and necessitated the involvement of some person to fill the role of public prosecutor.

In Chapter III, contemporary research describing criminal prosecutions in England between 1550 and 1850 will be considered. This research casts new light upon the English criminal prosecution system and the role or rather its lack, played by lawyers or the Attorney General. The information presented establishes two points; first, that criminal prosecutions in England were almost always conducted by private prosecutors (but in the Monarch's name), and second, that although during this period England had an official who became an *ad hoc* public prosecutor, the Attorney General was not involved in the scheme and there was no system of Crown Prosecutors prosecuting on behalf of the state as is commonly imagined. It was during the latter part of the period under study in Chapter III that criminal prosecution systems were in formation in colonial Canada.

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[35] Sections 91(27) and 92(14) of the Constitution Act 1867 distribute the criminal law powers between the federal and provincial legislatures. Under section 91(27), the federal government is given exclusive jurisdiction to make the criminal law which is applicable in all of Canada. Under section 92(14), the provinces are given exclusive authority to administer justice within the province. The Constitution Act 1867 did not spell out who had the authority to prosecute criminal code offences in the province. This paper will not consider that issue which has itself been the subject of a thesis by P.J. Kennedy; *The Prosecution Power in Canada*, (unpublished LL.M. thesis, University of Alberta, 1984), but rather will consider the question of the authority of a provincially appointed prosecutor to prosecute under the terms and restrictions imposed by federal legislation—the Criminal Code.

Chapter IV will consider briefly the history and origins of the Attorney General of England.[36] This will be done in the context of the material earlier presented in Chapter III with the purpose of showing that the Attorney General of England as chief Law Officer of the Crown, was never a public prosecutor. Nor did he ever personally, or through his appointed agents, prosecute crime on a general and continuous basis as is now done by the Attorney General in Alberta, and, as it is commonly assumed, may be done.

In Chapter V prosecutions for crime in Rupert's Land and later in the North West Territories will be discussed together with the relevant English, colonial, and federal legislation. It will be seen that the extant criminal legislation was directed at *private* prosecutions for crime in a manner identical to that of England, and that there was in the pre–confederation prairie West, no office, history, or tradition of *public* prosecutions.

In Chapter VI, the public prosecution system as it existed in Scotland in the nineteenth century will be considered in order to establish its influence on the public prosecution model adopted for use in Upper Canada. That has relevance here because the Upper Canadian criminal prosecution system, which combined the public prosecutions model of Scotland with the private prosecution scheme and common law of England, has become the *de facto* model upon which the Attorney General conducts prosecutions in

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[36] Professor J. Ll. J. Edwards has written exhaustively on this subject in *Law Officers of the Crown* (Ibid, p. 7), *The Attorney General Politics and the Public Interest*, (London, Sweet and Maxwell, 1984) and in many articles, a number of which may conveniently be found listed in Stenning, *Appearing for the Crown*, *supra* n. 29 at p.389.

Alberta.

In Chapter VII, modern legislation and case law are examined together with the pertinent literature to complete the review of the Crown prosecution system of Alberta and the inquiry into the authority of the local Crown prosecutor to prosecute *Criminal Code* offences. Criminal prosecutions in Alberta after 1905 are based solidly upon the legislation and legal structures established in the North West Territories between 1873 and 1892 and it will be shown that in all of Canada, Alberta is unique because the common law jury trial procedure has always applied to all indictable offences and a private prosecutor has always had the same right, if not the same powers, to prosecute by indictment as the Attorney General.[37] Finally it will be shown that without specific remedial legislation, full–time Crown prosecutors when preferring and then prosecuting Criminal Code offences by indictment, are in no better position than private prosecutors, and are, in most instances acting without authority.

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[37] In all other Canadian jurisdictions the Speedy Trial provisions, (trial by judge sitting without a jury) of the Criminal Code which did not apply in Alberta, limited prosecutions by indictment to the attorney General, his agents, or the Clerk of the Peace. This is discussed in detail in Chapter VII.

II. A BRIEF HISTORY OF CRIMINAL PROSECUTIONS IN ENGLAND TO THE SIXTEENTH CENTURY

Early Beginnings of Crown Jurisdiction Over Crime

After the Romans departed English soil in the fifth century, A.D., portions of it were conquered and re–conquered by succeeding generations of invaders. It would appear that these invaders had "a rough system of justice which was mainly concerned with crimes of violence."[1] Over the centuries the number of petty kingdoms which they erected were reduced and the value of a written law recognized, such that the "monarchs and councils of the larger succeeding aggregations issued codes [of law]."[2] The early record is scanty but there is evidence of a royal interest in crime from the late sixth century onwards.[3] It appears that among other things, the Sovereigns recognized at a very early stage the revenue potential to be obtained from the penalties imposed for crime.[4] During this period of Anglo–Saxon development, and up to the time of the conquest of England in 1066, the royal interest in crime continued to grow and develop along with the physical size of the kingdom. Both of these reached their peak under Canute (1016–1035), the last Anglo–Saxon monarch to rule a unified England prior to the conquest.[5] Under the Anglo–Saxons, local court systems with joint ecclesiastical and secular authority emerged and developed;[6] the government was centralized and a functioning judicial system was erected.[7] But it was nothing like todays centralized, government operated judicial structure, in that it operated on something similar to a franchise system.[8] Control of the courts and their jurisdiction over felonies and the lesser offenders was a steady and important source of revenues for the authority concerned.[9] Initially those revenues were payable to the lord in whose court the action was brought or against whose "peace" the act was committed.[10] It was in the context of this local franchise system that the Anglo–Saxon procedure for the prosecution of crime known as the "appeal" developed.

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[1] Desmond H. Brown, "The Canadian Criminal Code 1892: A Comparative Study in Codification", Doctoral Dissertation, University of Alberta, 1986, (to be published by University of Toronto Books, 1987) p. 57.

[2] Ibid, p. 59.

[3] Ibid, p. 57 The earliest record is that of Aethelberht of Kent a petty king who promulgated his "dooms" or laws c. 575-600 A.D. Ibid, p. 58.

[4] Ibid, p. 58. Speaking of the earliest set of royal "dooms" or laws Dr. Brown says that these mainly "comprised an elaborate schedule of pecuniary penalties for specific acts of violence." p. 59. He also discusses a number of other reasons for the desire of the Crown to promulgate its laws including the interests of the church and a desire to emulate their brother sovereigns on the continent. See pp. 57-59.

[5] Theodore Plucknett, *A Concise History of the Common Law*, (London: Butterworth's, 1956) p. 10. Following Canute's death his empire was divided until the "accession of St. Edward the Confessor (1043-1066)."

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[6] The bench of the local courts was a joint one comprised of the Bishop or his representative as well as the local Lord or his delegate. See Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 59.

[7] S.F.C. Milsom, *Historical Foundations of the Common Law*, (London: Butterworth's, 1981) p. 11.

[8] Ibid, pp. 11-27. Under the Anglo-Saxons local courts known as "county" and "hundred" courts evolved within the various jurisdictions that developed across England. These were under the control of the local lords and barons. The laws of these jurisdictions were by no means the same and these local courts "were the governing bodies of their communities, dealing with all their public business; and to us they would look more like public meetings than courts of law. But the way they performed their functions... was largely judicial" (p. 12). By the time of the accession of Edward the Confessor (1043), more than half of these county and hundred courts, "were in private hands" (p. 15). The local overlord who controlled these local courts, might be entitled to a small or large part of the profits of justice depending upon his relationship to the monarch. At the time of the Conquest and under Canute's development, the government and the court system, was to "a greater or lesser extent... in the hands of persons seen as the king's grantees rather than his agents" (p. 16). Prior to Norman rule, people in England were governed by their local courts and those courts were controlled by the king, either directly or through his grantees. "Government in the upper tier was largely a matter of accounting for what had become due to the king from the lower" (p. 26).

[9] Plucknett, *History of the Common Law*, *supra* n.5 at p. 422. Even though a matter may not have been a plea of the Crown, there were still court fees and other costs to be paid to the authority controlling the court. Over time, "expansion of the scope of royal pleas left its mark on even those offences over which the Crown did not take sole jurisdiction. Offenders were required to pay a fine to the king in addition to the composition they rendered to the injured party." Thomas Andrew.Green, *Verdict According to Conscience*, (Chicago: University of Chicago Press, 1985) p. 4ff.

[10] Cyril Phillips, (Chairman) *The Royal Commission On Criminal Procedure: The Investigation and Prosecution of Criminal Offences In England and Wales; The Law and Procedure.*, (H.M.S.O. Cmnd. 8092–1) p. 8ff, see also Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 7ff who describes the complex set of jurisdictions which existed just prior to the Norman Conquest. Milsom also describes the development of Crown control and centralization of the courts under the Normans, not through any conscious design but by an "almost sedimentary deposit of expedients." p. 27. Originally peace was not the antonym of violence but a synonym of protection and law. "It was not a mere abstraction but belonged to a person, usually the king or lord." The king might give his peace to his servants or those who might pay for the privilege. It might be extended to all persons in certain places (such as the assizes), the king's highways or where-ever the king was. "It was in short a personal thing to the king and not a governmental abstraction". Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 287. We do not know the process by which a breach of the king's peace came to depend upon the intrinsic quality of the act. Ibid.

The Anglo–Saxon Appeal

Under Anglo–Saxon law, proceedings concerning such things as simple homicide, maiming or theft, had little to do with the Crown and were commenced and pursued by the victim or his kin for the purposes of compensation.[11] Crime was not at first conceptually distinct from tort.[12] Most offences could result in two kinds of legal consequences, compensation for the victim, or in addition and depending upon the nature of the offence, a penalty levied by the authority whose law was broken.[13] Court proceedings could be commenced by the authority in whose jurisdiction the offence occurred, or by the aggrieved party. The venue was that of the authority concerned.[14] Thus the man who beat and maimed another might be "sued or prosecuted; and it might be in the king's court or some other depending upon whether the assault had broken the king's law, the king's peace."[15]

These early court actions were called appeals and they followed the same pattern as a civil suit—a writ was issued and then the accusation was proved.[16] In bringing an appeal, issue was joined when the plaintiff's complaint was met with defendants denial.

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[11] Plucknett, *History of the Common Law*, *supra* n.5 at 422ff; Simple homicide was one which came about as a result of accident, manslaughter or in self-defence. See also Green, *Verdict According to Conscience*, *supra* n.9 at p. 5 who indicates that until the twelfth century most prosecutions were privately conducted.

[12] Court actions fell into two main categories, those which later became known as Pleas of the Crown and those which were not. The methods of trial in either event were the same - some form of the ordeal or compurgation - and the proceedings were initiated and conducted by the aggrieved party. The main difference was that if a matter were a plea of the Crown, all fines penalties or profits, following upon conviction, went to the Crown rather than the victim. See Plucknett, *History of the Common Law*, *supra* n.5 at ibid., C. Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England supra* n.10 at p. 8ff and Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 53.

[13] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 16. Just as a hundred court might be in private hands and yet be part of the king's machinery of government, so all over England parts of the various jurisdictions were exercised in courts of the feudal pattern. At this time government and the judicial mechanisms were to a greater or lesser degree, "in the hands of persons seen as the king's grantees rather than his agents" ibid.

[14] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 53, see also p. 11 ff for a discussion of the structure of the local courts and their jurisdiction under the Anglo-Saxons.

[15] Ibid., p. 286. See n. 10 supra concerning the concept of "peace".

[16] J.H. Baker, "Criminal Courts and Procedure at Common Law", in J. S. Cockburn (ed.) *Crime in England 1550-1800*, (London: Methuen & Co. Ltd., 1977) 14-48 p. 17ff, see also Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 403-409.

Once the issue was joined a "medial" judgement[17] was entered awarding the burden of proving the case to one of the parties, usually the defendant.[18]

Proof might be the unilateral ordeal,[19] compurgation,[20] or trial by combat a procedure introduced after the conquest by the Normans.[21] The party awarded the proof was required to give security to perform it at an appointed time, and if they successfully completed the ordeal the case was won.

Once the formal accusation was made, (or threatened) the parties to the suit would then bargain over compensation with the appellor able to use the ultimatum of prosecution to strengthen his position. However the threat of prosecution was a two–edged sword because if no agreement was reached, proceeding with the appeal could put the appellor's life at risk where trial by combat was selected as the method of proof.[22] If the appellor ultimately lost the case he would be charged with all procedural, court and defendant's costs.[23] As the commentators make clear, the appeal procedure was of little benefit to any except the wealthy or powerful[24] and was not effective in bringing the majority of offenders to trial.[25]

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[17] Plucknett, *History of the Common Law*, *supra* n.5 at pp. 120-121, to render the medial judgement a jury would be called together to determine what ordeal ought to be assigned and to which party. See also William S. Holdsworth, *A History of English Law*, (7th ed.) (London: Sweet and Maxwell, 1969) p. 301ff, and Green, *Verdict According to Conscience*, *supra* n.9 at pp. 3-11 who suggest that in doing so the jury was in effect weighing the evidence and determining on the basis of the character of the accused, the suspicion or circumstances against him and the strength of the claim, whether he was in effect guilty or innocent and then tailoring the type of proof he would face to fit the crime and circumstances.

[18] Holdsworth, *A History of English Law*, *supra* n. 17 at p. 301.

[19] Idem. The trial by ordeal was based on the belief that God will intervene by a sign or a miracle to determine the outcome between two contending parties. "The person who can carry red hot iron, who can plunge his hand or his arm into boiling water, who will sink when thrown into water is deemed to have right on his side." See also James Bradley Thayer, *A Preliminary Treatise On Evidence At The Common Law*, (Boston: Little Brown and Company, 1898) pp. 34-39 for an account of the history of the ordeal and some of the methods used to determine the result.

[20] or oath helping or "wager of law" see Plucknett, *History of the Common Law*, *supra* n.5 at pp. 115-116 and Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 408 for a description of the process.

[21] Plucknett, *History of the Common Law*, *supra* n.5 at pp. 116-118. The Normans introduced trial by battle as one form of trial by ordeal. In civil cases it was not fought by the parties themselves but by their champions. In criminal matters it was fought by the parties in person. It was also deadly : if the defeated defendant was not slain on the field, he was immediately hanged. See also Holdsworth, *A History of English Law*, *supra* n. 17 at pp. 308-310.

[22] See Plucknett, *History of the Common Law*, *supra* n.5 at pp. 116-118 (ibid). See also Holdsworth, *A History of English Law*, *supra* n. 17 at p. 309 for a description of those persons such as the aged, females, infants and so forth who were exempted from trial by battle and who could appoint champions.

Pleas of the Crown

The "pleas of the Crown" can be contrasted with all other actions prosecuted by the victim in that upon conviction, the penalty or proceeds of any punishment imposed upon the accused went to the king.[26] While the mechanics of the proceedings involved are unknown it is clear that long before the Conquest "some offences were prosecuted on behalf of the Crown, and those persons found to have perpetrated the most heinous of them were at the Crown's mercy."[27] These proceedings were given the force of written law under Canute who, about 1030 A.D., proclaimed what was to be the last set of Anglo–Saxon dooms prior to the Conquest.[28] In them there appeared for the first time matters over which the Crown claimed exclusive jurisdiction and which later came to be called pleas of the Crown.[29]

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[23] Milsom, *Historical Foundations of the Common Law, supra* n.7 at pp. 406-409, see also Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 16 at pp. 17-18.

[24] Thayer *Treatise On Evidence At The Common Law, supra* n.19 at p. 39ff. With respect to trial by battle which had come into widespread use under the Normans, it not only was very unpopular with the English, but it gave a very distinct advantage to the rich who it seems, hired all the champions of any skill leaving the poor man with no one to defend him. As well, the costs involved with court proceedings involving trial by battle (and some of the other methods of proof) were very costly and out of reach for most potential litigants. "In a great degree it was for the purpose of displacing this dangerous, costly, and discredited mode of proof that…juries in their organized form were introduced" (p.41). The ancient appeal procedure was not abolished in England until 1809 by 59 Geo. III c.46. See also W. Blackstone, *Commentaries on the Laws of England*, (A Facsimile of the First Edition 1765-1769) (4 Vols.) (Chicago: University of Chicago Press, 1979) pp. 310-312 for the law concerning the appeal procedure up to the eighteenth century.

[25] Brown, *The Canadian Criminal Code 1892, supra* n.1 at pp. 71-72.

[26] Green, *Verdict According to Conscience, supra* n.9 at p. 5.

[27] Idem.

[28] Ibid., pp. 9-10.

[29] Brown, *The Canadian Criminal Code 1892, supra* n.1 at p. 59, see also C. Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England supra* n.10 at p. 8ff and Plucknett, *History* (con't)

Crown pleas began as matters in which the monarch was personally or directly interested.[30] They were either felonies[31] including treason and murder,[32] in which event the Crown interest was in the forfeiture of property,[33] or they were trespasses against the kings peace[34] for which the offender was fined. With the passage of time the list of pleas of the Crown expanded, thereby reducing the number of prosecutions which would benefit the victim directly. Nevertheless the Crown list was far from exhaustive and well into the twelfth century most prosecutions were still privately prosecuted by appeal[35] including those for manslaughter and theft. These were the two most common offences and had not yet been included in the Crown pleas.[36]

No clear development of medieval criminal law emerged from this era because of the mixed motives for prosecution—political and financial—and because of the mixed jurisdictions—royal and manorial.[37] Whether a matter was proceeded with as a tort or a crime was largely a matter of historical accident and choice of forum.[38] The concepts of

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of the Common Law, *supra* n.5 at ibid., p. 421ff for a history of pleas of the Crown which developed without any distinction as to whether they were "crimes" or "torts" but did constitute the beginnings of English criminal law.

[30] C. Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England supra* n.10 at pp. 8-9

[31] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 406. Felony originally meant a breach of the faith owed by a man to his lord which was so fundamental as to end the relationship between them—entitling the lord to occupy his tenants land and treat them as his own. The penalty in all cases of felony was death. After felonies became pleas of the Crown, it developed that upon conviction a felon's tenement would go first to the king—with only the remaining bare land left to go to the lord as his escheat. See also Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 71.

[32] Green, *Verdict According to Conscience*, *supra* n.9 at p. 4. At this time the felony of murder was a homicide by stealth where the offender took his victim by surprise and then hid his misdeed from others. This was in contrast with simple homicide such as accident, self-defence or manslaughter. See also Sir Fredrick Pollock and Frederic W. Maitland, *History of English Law*, (2nd ed.) (Cambridge: University Press, 1968) (2 Vols.) Vol. 2 p. 485ff.

[33] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 406.

[34] Plucknett, *History of the Common Law*, *supra* n.5 at p. 422.

[35] They were privately prosecuted similar to an action in tort. Until the Crown claimed exclusive jurisdiction over particular types of offences prosecutions concerning them were not taken in the name of the Crown

[36] Green, *Verdict According to Conscience*, *supra* n.9 at pp. 4-5

[37] As noted above courts were not centralized under the Anglo-Saxons and were operated on a franchise-like basis. See also Plucknett, *History of the Common Law*, *supra* n.5 at pp. 421-423.

[38] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 403-406.

"tort" and "crime" were unknown in the middle ages and thus something was a plea of the Crown because, upon conviction, the various revenues and penalties went to the king instead of the local lord. Conversely a matter became a "common plea" either because it was civil in nature, or if a crime, because it was one of the offences which could still be prosecuted privately for compensation or restitution as if it were a tort.[39]

As the royal costs of administration grew and demands upon its treasury burgeoned, the Crown (particularly under the Normans) increasingly claimed jurisdiction over more and more offences making them pleas of the Crown.[40]

Norman Innovations After 1066

By Canute's time England had become a centralized and united kingdom with a settled system of courts; although these were not centralized.[41] Following the conquest of England by duke William of Normandy, there was no sharp break in the method of prosecutions for crime, or the court systems. For a period of time after the Norman conquest, the provincial government of England continued to be administered through the expedient of the local courts, and prosecutions for crime continued to be taken by appeal.[42] Although William approved in general the laws of his Anglo–Saxon predecessors, he did made some important institutional changes. Prime among these was the separation of the secular and ecclesiastical jurisdictions.[43]

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[39] Ibid., and see Plucknett, *History of the Common Law*, *supra* n.5 at pp. 421-426.

[40] C. Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England supra* n.10 at pp. 27-29.

[41] Ibid. pp. 11-12, and Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 59.

[42] See Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 11ff. William the Conqueror took over a going legal concern, and while legal and administrative institutions existed throughout England these were by no means the same. Laws and institutions were local, often reflecting the different ways of life which in turn went back to the piecemeal nature of the earlier conquests and settlements. The functions of the local courts (county and hundred), which operated in a fashion roughly similar to a parish council with additional jurisdiction to deal with personal disputes between citizens, are described at pp. 13-16.

Secularization of the Courts and the Justice of Assize.

Prior to embarking on his greatest project, the Doomsday Book, William, issued a decree taking away the right of church dignitaries to exercise joint authority in the local courts as they had in the past.[44] By the end of the eleventh century, because of this change, the sheriff, who was directly accountable to the king, became the dominant local judicial official.[45] The sheriff's increased authority became a serious political and economic problem for the Crown[46] and "various expedients were tried to keep it within manageable proportions."[47] The lasting method of control was a system of itinerant justices of assize who developed out of an earlier Anglo-Saxon model, the justices in Eyre.[48] These officials were sent out to the counties by the king armed with his authority to sit in judgement of those pleas brought under the criminal and petty assizes.[49] For a time there were dual jurisdictions as between the sheriff and the justices in Eyre, who only went round the kingdom from county to county once in every seven years.[50] In the interim the sheriff remained the king's minister in the local area.[51] This patchwork system would not develop into the powerful common law courts of later times until one further but most important innovation was made—the use of a jury of presentment.

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[43] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 60.

[44] Ibid. This decree ultimately gave rise to the dramatic jurisdictional dispute between Thomas à Becket and Henry II, which culminated in the murder of Becket and the supremacy of the Crown in secular judicial affairs. See also Plucknett, *History of the Common Law*, *supra* n.5 at pp. 12 and 16–18.

[45] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 60.

[46] Plucknett, *History of the Common Law*, *supra* n.5 at pp. 101-102. In many cases the sheriff had become something of a local tyrant who did not always account fully for the taxes, fees, fines and penalties which he collected on the king's behalf. The Court of Exchequer (the first of the three common law courts to be established by the Normans) was set up to deal with questions concerning the king's treasury and the problems with the sheriffs. (Ibid.)

[47] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 61.

[48] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 25-36. Milsom here describes the Eyre and Assize systems, the eventual rise of the central courts and the development of the writ system. The justices in eyre were the king's ministers who were sent round from county to county as a check on the sheriff and the local courts, and in order to enquire into "all matters of possible profits to the king." (p. 28). Milsom says, "The coming of the Justices in eyre was the coming of royal power, and before them would appear the fullest assembly of the county. The ordinary governmental authorities stopped working, and they themselves came to judgement." (p. 27).

[49] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 61, see also Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at ibid.

The Assize Of Clarendon And The Jury Of Presentment (1166–1215)

Until 1166 prosecutions for crime—whether private actions in tort or pleas of the Crown, were still conducted using the old and ineffectual Anglo–Saxon procedure of appeal. A more effective procedure was wanted and a hundred years after the Norman conquest one was provided.

It was Henry II who moved decisively to assert the Crown's jurisdiction over trial and punishment for all felonies at the expense of local jurisdictions and to make certain that local officials were actively concerned with the royal program of law enforcement.[52] The royal interests in the shifting of most criminal offences from private actions to pleas of the Crown were embodied in the Assize of Clarendon of 1166.[53] "This was the sworn inquest or 'jury of presentment', the precursor of the modern grand jury."[54] Using this new procedure not only would more crime be punished, but more importantly there would be considerable Crown revenues to be derived from increased prosecutions.[55] By the terms of the Assize the Crown not only enlarged its exclusive jurisdiction over criminal matters but saw many more offences go to trial due to the new procedure for criminal prosecutions.[56] Through the establishment of a series of inquisitions, known first as the jury of presentment[57] and later as the grand jury, the machinery of justice was set in motion which would compel[58] the local population to bring pleas of the Crown to royal attention.[59] In this way much valuable information was obtained by compelling the inhabitants of each community to answer questions and inform against known and suspected criminals and to disclose mysterious deaths and other crimes.[60]

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[50] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 61. This seven year cycle was changed by the terms of Magna Carta (1215), by which the justices in Eyre were directed to go to every county at least once a year. Later in the thirteenth century, following Magna Carta, the royal justices who were sent round to try the assizes came to be called the "justices of assize", and their sessions were called the "assizes".

[51] There is little detailed knowledge of the proceedings at the judicial Eyre's prior to the Assize of Clarendon in 1166. Plucknett, *History of the Common Law*, *supra* n.5 at at p. 428. The local courts had jurisdiction over all types of legal disputes (including pleas of the Crown). Therefore the institution of the justices in Eyre not only brought the king's justice to the people but it was an administrative check and review of the sheriff's accountings to the king. It was because of the need to examine the administration of the Sheriff's that the Court of Exchequer developed, and from the justices in Eyre grew the Court of King's bench. Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 16, 25-36, and see also Plucknett, (ibid. p. 102) ff.

[52] Green, *Verdict According to Conscience*, *supra* n.9 at p. 7.

[53] The full text of the Assize of Clarendon may be found in Carl Stephenson, and Frederick Marcham, eds. and trans., *Sources of English Constitutional History*, (1st ed.), (New York: Harper and Row, 1937). pp. 76-80.

[54] Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at pp. 71-72.

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[55] See Plucknett, *History of the Common Law*, *supra* n.5 at p. 112ff, see also Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. I at p. 145, who speak of the "abundant profits reaped by the itinerant justices in the field of criminal law" as a result of the Normal trial and court innovations.

[56] This procedure is discussed below.

[57] Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. I at p. 143ff. The earliest recorded juries were employed to discover and present facts in answer to the enquiries of the sovereign. Where for example the monarch wished to find out, as between himself and another, who had the right by ancient usage to a piece of land, he would summon together twelve or more men of the locality who could be expected to know the truth of the matter. These were put under oath and were then asked questions to reveal the information sought. In this way disputes over royal rights could be settled without armed conflict. Not long after the Norman conquest the jury of presentment appeared in regular use in England as a tool for the government's use in obtaining information from an unwilling populace. See Plucknett, *History of the Common Law*, *supra* n.5 at p. 111. It was in this fashion that the great Doomsday book of the Normans was compiled. Where at first the jury of presentment was reserved for Crown use, by the Assize of Clarendon, Henry II brought the institution into general use. As well he moved to significantly increase the Crown revenues by making whole categories of serious crime into pleas of the Crown and therefore matters of royal concern and jurisdiction (ibid. pp. 428–429). It was evidently his intention, through the Assize of Clarendon and the resulting juries of presentment, to hear about many criminals who would otherwise have escaped prosecution. The assize had specified that indicted felons could be tried only by the King and any forfeitures were his. The indictment procedure—the finding of the jury of presentment—"therefore superseded all local jurisdictions both in the matter of trial and of profits." (ibid). From this point onward it became most important for the Crown to regularly send round its justices to "deliver the goals" of those who had been committed to prison on indictment through the jury of presentment process. See also Holdsworth, *A History of English Law*, *supra* n. 17 at p. 312ff and Thayer *Treatise On Evidence At The Common Law*, *supra* n.19 at p. 51ff.

[58] As indicated above, pleas of the Crown or private actions brought by way of the Anglo–Saxon trial by appeal were expensive, possibly dangerous, and uncertain and for that reason many crimes were not prosecuted. Also, because settlement of the action once started, was possible and was employed prior to trial and outside of the court process, many matters never went to court. Now, by the terms of the Assize of Clarendon the local population were required to bring all crimes to the Crown's attention using the process described in the preceding footnote. See also Plucknett, *History of the Common Law*, *supra* n.5 at p. 112.

[59] Ibid. p. 112.

The jury of presentment in the presence of royal officials was the key to the Crown's new program of expanded trial jurisdiction and punishment for all felonies.[61] The presenters were bound by their oath to report all those suspected of felony. All those so accused were, through the act of presentment before the king's officials placed within the Crown's jurisdiction thus ousting the jurisdiction, and likewise the fees and revenues, of the local franchise holders.[62] So it was that the Crown took control over major crime and its prosecution. Concerning the effect of the legislation of 1166;

> The Assize and subsequent commissions to justices to hear and determine hundred–jury presentments constituted a significant advance where the Crown took control over the law of felony. All homicide and all theft were subject to presentment by the hundredmen. Private accusations leading to private composition, in the Anglo–Saxon manner [came] virtually to an end.[63]

Over the next fifty years the law and procedure of the jury of presentment developed to meet the needs of the society it served. Part of that development concerned the early beginnings of what today would be the function of a trial jury—determining the ultimate question of guilt or innocence.

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[60] Ibid. pp. 112–113.

[61] Green, *Verdict According to Conscience, supra* n.9 at p. 7, also Holdsworth, *A History of English Law, supra* n. 17 at p. 321. The Norman jury of presentment was the linear descendant of earlier continental juries of inquisition. The jury of presentment were called together to deliver to the king's representative those suspected or accused of serious crime. They presented from their own knowledge or the hearsay knowledge of others.

[62] Green, *Verdict According to Conscience, supra* n.9 at pp. 7-9. Their accusations were to be made before the royal justices, but it appears in practice it was often done before the sheriff. The process thus set in motion before the sheriffs was later monitored by the royal justices on their Assize circuits.

[63] Ibid., p. 9.

According to the terms of the Assize, 12 lawful men of each hundred[64] were to be chosen to take the oath. These were presumably men of stature in their community whose word would not be doubted and who enjoyed the confidence of their peers.[65] These "sworn men of the inquest were asked not to accuse anyone, still less to evaluate evidence set before them, but to give voice to common fame. [To declare who was] publicly suspected"[66] Following formal presentment, the sheriff or assize justice ordered the accused to be arrested and held for trial; those already in hand were tried immediately, typically by the ordeal of water.[67] While the presenting jury was to name all those from the community suspected of treason or felony—in practice it named only those for which there was in their opinion, a good basis for suspicion.[68] Professor Green suggests that the jury performed a dual function. In the first stage they accused by identifying or reporting to the authorities all those about whom there was some cause for suspicion. In the second, they considered the accuracy of the opinion and formally presented only those against whom there was a good case.[69] Once finally presented the accused underwent the ordeal the outcome of which was believed to be determined by God.[70]

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[64] Historically these were the oldest divisions of local government, the hundred itself being composed of villages or townships. See C. Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England supra* n.10 at pp. 2-3.

[65] Green, *Verdict According to Conscience*, *supra* n.9 at p. 7.

[66] R.H. Helmholz, "The Early History of the Grand Jury and the Canon Law". (1983) 50 *University of Chicago Law Review*, pp. 616-617. On the basis of the answers given by the jury of presentment the second stage of the trial took place. Persons suspected were required to swear on oath that they were innocent, if they had not confessed their guilt, which oath was tested by ordeal of water.

[67] Green, *Verdict According to Conscience*, *supra* n.9 at p. 7.

[68] Ibid., p. 11.

The ordeal was not the inevitable fate of those formally accused by the jury of presentment. There is some evidence indicating that the accused could obtain a writ[71] to have a special jury of inquisition.[72] It is probable that defendants claiming to have slain through accident or self–defence tried to secure such writs from the Crown—a privilege which cost a substantial sum but which if granted, might allow them to avoid the ordeal.[73] The embryonic beginnings of trial by jury can be seen in the two stage process of the jury of presentment and in the function of the special jury of inquest obtained by writ.

Around 1200 A.D. other embryonic forms of the criminal trial jury began to take shape. These first appeared in connection with the Anglo–Saxon appeal which was still in use for those offences that were not pleas of the Crown.[74] It developed that "persons who had been appealed and imprisoned as part of the pre–trial procedure, could secure an inquest into the merits of the appeal before being subjected to the forms of physical proof available in such actions—combat or ordeal."[75] In theory the inquest jurors were to decide whether the appeal had been brought maliciously, but in practice the jurors considered the ultimate issue of the guilt or innocence of the accused.[76]

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[69] Ibid., pp. 2-3. Those known or believed to be guilty would be publicly accused and made to undergo the ordeal. Those for whom there was reasonable suspicion only, were also presented, but could make their proof by compurgation; that is, by the use of "oath helpers" or men who would swear that what the accused said was true. For those about whom the presenting jury felt the suspicions were not well-founded, although never publicly presented (or indicated) those accused were declared "not suspect" and went free. Ibid.

[70] Ibid., p. 11, see also Thayer *Treatise On Evidence At The Common Law*, *supra* n.19 at p. 39. Thayer tells us that "the conception which was at the bottom of the ordeal…is often misunderstood,… under the arrangement of the Assize of Clarendon the ordeal was, in fact, only a mode of giving to the culprit a last chance of escaping the punishment of law. The ordeal [was] a resource following the verdict [presentment] of a jury acquainted with the fact, [and] could only be applied to those who were to all intents and purposes proved to be guilty." Ibid., footnotes omitted.

[71] A writ was an order in the name of the monarch under seal of the Crown.

[72] Green, *Verdict According to Conscience*, *supra* n.9 at pp. 12-13. The special jury of inquisition would then inquire into the facts of the matter and could recommend that the accused by pardoned.

[73] Ibid. If granted a writ the defendant's argument would be that he had not acted feloniously. Ultimately he would seek and obtain a royal pardon.

[74] Idem.

[75] Idem.

By making the presenting jury available to the public for use in private actions and by placing all felonies within Crown jurisdiction, the Assize of Clarendon forged both a jurisdictional[77] and procedural revolution. As well, it created something more—the trial jury as distinct from the presenting jury. Thus from one origin the Assize of Clarendon spawned several varieties of jury:[78]

> On the criminal side the royal inquisition became the grand jury for presenting criminals, and when the older forms of trials ceased to function then a trial jury for indicted prisoners was assembled...simultaneously, many appellees avoided trial by battle by purchasing from the Crown the privilege of a jury, and so we get the trial jury for felonies.[79]

The decisions of these early trial juries were not yet final ones. Those persons formally presented, were subject to the final judgement of God in the ordeal. As will be seen the use of the ordeal as the method of trial to determine guilt or innocence would not last much longer.

The Abolition Of The Ordeal And The Rise Of Trial By Jury (1215–1550)

Although the courts had been separated into secular and ecclesiastical institutions following the Norman Conquest, the church still played a crucial part in the judicial process of the courts of the realm. Its priests pronounced the invocation at the start of the ordeal calling upon God to determine the outcome. That was all changed by edict in 1215. As Professor Milsom states;

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[76] Roger D. Groot, "The Jury in Private Criminal Prosecution Before 1215". (19[illegible]3) 27 *American Journal of Legal History*, p. 113. See Holdsworth, *A History of English Law*, *supra* n. [illegible]7 at p. 323, and Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. II at pp. 617-6[illegible]8. By the end of the twelfth century a person proceeded against by appeal had the right to a trial by jury upon payment of the necessary fees for the writ and related court costs.

[77] Green, *Verdict According to Conscience*, *supra* n.9 at p. 10.

[78] Plucknett, *History of the Common Law*, *supra* n.5 at p. 120.

[79] Ibid.

> The suspicion of the countryside first put a man to his law: to the ordeal if there was some material proof beyond the suspicion, to compurgation if not. The Assize of Clarendon in 1166 seems to have provided that the mere suspicion should always be enough to put a suspect to the ordeal; and for half a century that was the routine. But the mechanism of the ordeal turned upon the invocation of the priest; and after anxious inquiry the church in 1215 decided that it was superstition and forbade priests to take part. The decree was promptly obeyed in England and the mode of trial of centuries was brought to an end.[80]

The decision of the church forbidding its priests to take part in the ordeal,[81] created great "practical and intellectual disarray . . . the responsibility for putting men to death could no longer be rested comfortably upon God."[82] The English Crown soon acquiesced to the decision but its response was hardly creative.

In a writ directed to the Justices in Eyre in 1219, Henry III prohibited the use of the ordeal.[83] The decree did not propose any alternatives to the ordeal or suggest how final decisions of guilt or innocence should be made. It did propose interim measures—imprisoning those accused of grave crimes, banishing those accused of less serious crimes, and, requiring those accused of minor crimes to enter into the local equivalent of a peace bond.[84] These measures were impractical for more than a short time and an alternative to the ordeal was still to be found. The writ did not propose holding any trial because, whether under the Norman procedure of presentment, or the old Anglo–Saxon one of appeal,[85] trials were no longer solvable by ordeal.[86] There was quite literally no trial process remaining. In abolishing the use of the ordeal the writ of 1219 had the same effect as would a modern order extinguishing trial by judge and jury.[87] Thus it was that the one universal and lawful means of criminal trial having been abolished, and in the absence of directions from the Crown, it was left to the itinerant justices in Eyre to find a replacement.[88]

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[80] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 410.

[81] The Fourth Lateran Council, 1215 see Plucknett, *History of the Common Law*, *supra* n.5 at p. 118.

[82] Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at p. 410.

[83] Holdsworth, *A History of English Law*, *supra* n. 17 at p. 311.

[84] For the text of the writ see Holdsworth, *A History of English Law*, *supra* n. 17 at p. 323 or Plucknett, *History of the Common Law*, *supra* n.5 at p. 119.

The Rise of Trial by Jury

Fortunately for the justices of Assize[89] their dilemma was not quite as great as ours might be under similar circumstances. "In 1215 when the use of the ordeal came suddenly to an end there were ample precedents for putting laymen on oath to say whether or not a suspect was guilty of felony."[90] The ease with which the English adapted to trial by jury after the writ of 1219 is largely explained by the prior use of the jury, obtained by writ, in private actions of appeal;[91] as well as its parallel development under the jury of presentment process.[92] Once the ordeal was removed it was but a small step to allow the jury to determine the ultimate issue.[93] The Assizes of the itinerant justices had familiarized the justices and the community with the idea that a body of men might make the ultimate decision of guilt or innocence, and that an accused might agree to be tried in such a fashion.[94] Thus it developed that an accused could, as his proof of denial on a criminal charge,[95] agree to submit to the decision of his neighbours, or as it came to be termed, to put himself "upon the country."

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[85] Following the Norman conquest prosecutions for crimes which were not felonies and therefore not pleas of the Crown, could still be taken using the Anglo-Saxon appeal. Unlike the Norman system of presentment, the appeal procedure was completely dependant upon the ordeal for its efficacy. Following its abolition the old Anglo-Saxon appeal procedure died out.

[86] Plucknett, *History of the Common Law, supra* n.5 at pp. 121-124. In the private action of appeal, following the abolition of the ordeal a practice may have developed whereby the justice in Eyre, in order to determine an issue, arranged to take the opinion of several juries. These juries were self-informing. That is, once told of the allegation they did not formally hear from the complainant or the defendant but set about as individuals to gather information later coming together as a group to reach a conclusion. The justice after having heard from each of the juries, considered their findings and pronounced judgement (ibid). This was an expensive process for litigants and very time consuming for the court, and appears not to have been anything other than an *ad hoc* arrangement.

[87] Milsom, *Historical Foundations of the Common Law, supra* n.7 at pp. 410-413.

[88] Ibid.

[89] Formerly known as the justices in Eyre, justices in Assize was the term which came into common usage in the thirteenth century.

[90] Green, *Verdict According to Conscience, supra* n.9 at p. 13.

[91] See "Trial by Jury - Early Beginnings," *supra.*

[92] Plucknett, *History of the Common Law, supra* n.5 at pp. 120-121.

The Grand and Trial Juries—A Division of Functions

Before 1215 the screening[96] aspect of the presenting jury's role had not been defined and was incidental to its presentment role. With the abolition of the ordeal the two functions of the jury were separated and came to be more clearly distinguished.[97] The presenting jury now named all those for whom there was a sound basis of accusation. If the accused agreed to a verdict by the country, "untempered by God's confirming judgement, he put himself upon the judgement of his countrymen who were sworn to give a truly dispositive verdict on the basis of what they learned about the suspect's guilt."[98]

To "go on the country" meant at first having a trial jury composed of some or all of those from the presenting jury.[99] Over the course of the next century and because of the

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[93] Ibid.

[94] Green, *Verdict According to Conscience*, *supra* n.9 at pp. 11-20. See also Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 410-413 and Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. II at pp. 647-651.

[95] Just as the successful completion of the ordeal or compurgation (oath-helpers) was the "proof" of innocence prior to 1215, so too the favourable verdict of the jury became the proof of innocence after 1215. See Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 410-413.

[96] Discussed in "Trial by Jury - Early Beginnings," *supra*.

[97] Green, *Verdict According to Conscience*, *supra* n.9 at p. 14

[98] Idem.

[99] Ibid. p. 15, see also Milsom, *Historical Foundations of the Common Law*, *supra* n.7 at pp. 410-413, Milsom says "of the actual conduct of the trial we know almost nothing before the sixteenth century, and not nearly enough until the eighteenth." This much is known, there was between 1215-1600 no formal presentation of evidence through witnesses as in the modern jury trial. The jury was self-informing - it

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complaints of the accused,[100] the two juries became increasingly distinct.[101] It soon developed that most persons who came to be tried at the assizes, pled not guilty and chose jury trial. A few refused to plead, exercising their right to have their fate ultimately decided by God rather than man.[102] These were subjected to the *peine forte et dure*. By this procedure they went without food and drink and heavy weights were placed upon their chests until they pleaded or died. Many died, but not having been convicted they avoided forfeiture.[103]

The Grand Jury

In the two centuries after 1215 the presenting jury established procedures and law of its own and came to be called the grand jury. It developed that the chief role of the grand jury was to decide whether to find a "true bill" or to endorse *ignoramus* (ignore) on the indictments[104] of those accused of crime before it. Those indictments marked as a true bill

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found out about the facts of a case as individuals living in the community - then it came together, pooled its knowledge and reached its decision. See also Green, *Verdict According to Conscience*, *supra* n.9 at pp. 3-64.

[100] In 1352, legislation enabled an accused to challenge a juror on the ground that he had been a member of the presenting jury. (Stat. 25 Ed. III, stat. 5, c. 3)

[101] See Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. II at p. 644ff. for details concerning the workings of the trial jury.

[102] For reasons not altogether clear - but possibly because the jury was the defendants own proof to be chosen by him in place of God - it became law that an accused must choose to be tried by a jury. If he refused to plead or having pled not guilty, refused to choose trial by jury, an impasse was reached because there was no other lawful means of trying him. In 1275 a statute was passed requiring "notorious felons" who would not choose trial by jury to be subjected to strong and hard imprisonment or "*prison forte et dure* ". See Thayer *Treatise On Evidence At The Common Law*, *supra* n.19 at p. 74ff., and James F. Stephen, *A History of the Criminal Law of England*, (Vol. 1) (New York: Burt Franklin Publishing, 1964) pp. 297-301 for the history of "strong and hard imprisonment" which later became corrupted to *peine forte et dure*, or painful and hard imprisonment. By refusing to plead or accept trial by jury, those accused of felony, although subjected to a gruesome torture until death, were never technically convicted of felony. Hence their lands and property were not forfeited to the Crown. By accepting this fate, felons who believed a jury would convict them in any event, could at least save their property for their family since they would die which ever procedure they followed! See Holdsworth, *A History of English Law*, *supra* n. 17 at p. 326 for further discussion on the dilemma posed by accused's refusal to plead.

[103] Idem.

[104] Anyone might appear before the grand jury and accuse another—presenting a draft indictment. It was upon the indictment document that the grand jury endorsed its finding. See Stephen, *History of the Criminal Law of England*, (Vol. 1) *supra* n.103 at p. 293.

by the grand jury did not amount to an assertion that the accused was guilty—but only that he was suspected of crime.[105] While there was initially some confusion over the role of the grand jury,[106] after a time it was recognized by the courts that its role was simply to determine whether the prosecutor had presented enough evidence on the draft bill of indictment to warrant a trial.[107] It was upon the true bills found by the grand jury that the trial jury would base its deliberations. While the grand jury could still "present" from its own knowledge, over the fourteenth and fifteenth centuries it developed into a passive body that primarily considered the allegations of others in determining whether an indictment should be found.[108] At the same time that the grand jury was changing from a body of active accusers to one of passive indictors, the trial jury was going through a similar process.[109]

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[105] Holdsworth, *A History of English Law*, *supra* n. 17 at p. 322.

[106] Ibid pp. 322-326. Some confusion existed during the period of time when grand jury members also sat on the trial jury. There was consternation when the trial jury acquitted someone it had earlier presented. Some judges thought the trial jury should be punished for this seeming inconsistency and did so. The threat that trial juries, which contained members of the grand jury, might be punished if they acquitted the accused, was a further reasons why the accused objected to their being on the trial jury. See also Plucknett, *History of the Common Law*, *supra* n.5 at pp. 126-127.

[107] The grand jury was regularly constituted and sworn in at every session of assizes. By law and practice anyone could appear before them with an indictment and the necessary witnesses to prove its truth. "Prosecutor" was the term given to the person making an accusation before the grand jury. Stephen, *History of the Criminal Law of England*, (Vol. 1) *supra* n.103 at p. 293. While at first presentments were delivered orally, sometime in the thirteenth century they were put into written form and in 1285 that practice was made mandatory. See Brown, *The Canadian Criminal Code 1892*, *supra* n.1 at p. 72. The written accusation presented to the grand jury by the prosecutor was called a draft bill of indictment. Only after the grand jury found it to be a true bill and marked it as such, did the document take on any legal validity.

[108] John H. Langbein, "The Origins of Public Prosecution at Common Law" (1973) 17 *American Journal of Legal History*, pp. 313-315 and 332-334; see also Green, *Verdict According to Conscience*, *supra* n.9 at pp. 105-108, and John H. Langbein, *Prosecuting Crime in the Renaissance*, (Cambridge, Mass.: Harvard University Press, 1974) pp. 119-120.

[109] See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.109 at p. 77 where Langbein states that the common law criminal trial process was very poorly documented from 1200-1640 A.D. He further states that because of the absence of defence counsel and because of the absence of the prosecution counsel at all but exceptional cases, there was a "stunted development of criminal law reporting. Lawyers literature does not emerge where lawyers have no role." Ibid.

The Trial Jury—From Active to Passive

It is commonplace that the medieval trial jury informed itself as to the facts of a case, but how the jury came to be informed is not known.[110] Milsom writes that "of the actual conduct of the trial we know almost nothing before the sixteenth century."[111] It is known that it was the duty of the jury members, as soon as they were summoned for duty, "to make enquiries about the facts of which they will have to speak when they came before the court. They must collect testimony, they must weigh it and state the net result in a verdict."[112]

It was the juror's job to be a self–informed witness in the trial and he was to approach others for his information.[113] As a result of abuses which arose, a witness who on their own initiative approached a juror with information, might be charged with an offence and fined.[114] Even if the jury were prepared to hear a witness, until the sixteenth century, there was no formal process available to compel the witness into court.[115] As a result of uncertainty in the law, the absence of legal process to compel witness attendance and the fear of being punished, the practice of the jury hearing witnesses, as is now done in criminal proceedings, developed very slowly and by a process that has yet to be documented.[116] While little is known of their methods, it is not unreasonable to assume that with changes in the social and political structures in England, and as populations moved and urban centres grew, there was a gradual evolution from the active self-informing jury intimately familiar with the affairs of the community, to a passive jury, which was not knowledgeable about the affairs it was asked to decide upon.[117] Such a jury would require evidence to be placed before it in order to reach its decision.[118] That need coupled with other problems which had developed in the prosecution of crime by the middle of the sixteenth century gave rise to the prosecuting justice of the peace; our subject in the following chapter.

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[110] Idem, see also Green, *Verdict According to Conscience, supra* n.9 at p. 16.

[111] Milsom, *Historical Foundations of the Common Law, supra* n.7 at p. 412. Even Professor Green, who has made an extensive study of the medieval trial jury, says we know little of the jury process once the jury is sworn.

[112] Pollock and Maitland *History of English Law*, (2nd ed.) *supra* n. 32 Vol. II at pp. 624-625, (footnotes omitted).

[113] Thayer *Treatise On Evidence At The Common Law, supra* n.19 at pp. 119-136. Thayer says that pains were taken to include on the jury persons from the very locale where the crime occurred. As well time was allowed (a few days) between the empanelling of the jury and the trial, to allow the parties time to "inform" the jury members and to allow the jurors time to make their own inquiries. Ibid, pp. 91-93.

[114] Idem.

[115] Idem.

[116] Ibid p. 128 ff.

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[117] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 109 at p. 314. Langbein suggests that the transformation of active self-informed juries, to passive ones, is one of the greatest mysteries of English legal history (Ibid). See also Green, *Verdict According to Conscience*, *supra* n.9 at Chap. 4 "Transformation of Jury Trial in Early Modern England."

[118] Idem. In Sir Thomas Smith's *De Republica Anglorum*, (New York, N.Y.: Barnes and Noble, 1583), Smith provides a detailed account of a criminal jury trial *circa* 1550. From the account it is clear much change will yet take place. In Smith's day counsel did not play a role, the trial was not divided into the prosecution and defence case and cross examination is at a rudimentary stage.

III. THE DEVELOPMENT OF CRIMINAL PROSECUTIONS IN ENGLAND AFTER 1550

The Justice Of the Peace Becomes The Unofficial Public Prosecutor 1550-1750

Introduction

> What are the origins of the office of the public prosecutor at common law? That question has not been much asked....However fundamental he may appear to us, the public prosecutor was an historical latecomer.[1]

Lawyers have generally assumed that the modern system of lawyer–prosecutors began sometime during the early Tudor period.[2] It is because of the regular appearance of the Attorney General as law officer for the Crown in the *State Trials* [3] series that many believe the present public prosecution's system traces its origins to that time or earlier.[4] However the *State Trials* series are misleading as precedents, and are not typical of the way prosecutions were conducted at that time.[5] Certainly there is no mention of a lawyer–prosecutor in Sir Thomas Smith's account of an ordinary criminal trial in his day[6]

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[1] John H. Langbein, "The Origins of Public Prosecution at Common Law" (1973) 17 *American Journal of Legal History*, pp. 313–315.

[2] Idem.

[3] T.B. Howell, *Complete Collection of State Tryals and Proceedings For High Treason and Other Crimes and Misdemeanors* (London: 1809–1826, 33 Vols).

[4] In his *History of the Criminal Law of England* (3 Vols) (New York: Burt Franklin Publishing, 1964, a reprint of the 1883 edition), Sir James Fitzjames Stephen bases his accounts of criminal trial proceedings on the highly atypical *State Tryals.* series. See Douglas Hay, "The Criminal Prosecutor in England and its Historians" (1984) 47 *Modern Law Review*, p. 4.

[5] See John H. Langbein, "The Criminal Trial Before the Lawyers" (1977–78) 45 *University of Chicago Law Review*, pp. 282–283, and see Thomas Andrew.Green, *Verdict According to Conscience*, (Chicago: University of Chicago Press, 1985) at p. 106 where Green says there is good reason to doubt that the state trials accurately reflect criminal procedure in routine felony cases which the Crown lacked both the interest and capacity to manage.

[6] *Circa* 1565, see Thomas Smith, *De Republica Anglorum*, (New York, N.Y.: Barnes and Noble, 1583) pp. 94–104.

State trials were almost always politically motivated because they directly affected the interests of the Crown and its ministers. Moreover they were subject to special procedures not followed in ordinary criminal trials.[7] For example the trials were held only in London under the watchful eye of the political authorities, and under special commissions of oyer and terminer.[8] As well, both trial judges and juries were handpicked for each particular case.[9]

By contrast ordinary felony cases were tried locally by regular Assize judges on their usual circuits.[10] The jury was called by the sheriff in the usual way and once empanelled, jurymen might hear six or more cases before retiring to determine their verdicts in all of them.[11]

The most important of the procedural differences between state and ordinary trials was that lawyers "were typically *not* involved in the prosecution or defence in cases of ordinary felony."[12] While it is generally known "that the accused was regularly denied defence counsel in all trials of the period, what has not been recognized is that there was usually no prosecuting counsel either. Here the *State Trials* have misled us."[13] The assumption, that just as we "see Lord Coke prosecuting in *Raleigh's Case*"[14] therefore, in routine criminal matters junior Crown lawyers must have been doing the same thing, is quite wrong.[15]

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[7] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at pp. 315–316.

[8] Idem.

[9] Idem.

[10] Idem.

[11] Ibid. Lawyers did not become involved in criminal trials until after 1750, and prior to that time it was not uncommon for a jury to hear twenty cases in a day. See Hay, "The Criminal Prosecutor in England and its Historians", *supra* n. 4 at p. 4, see also Green, *Verdict According to Conscience*, *supra* n.5 Part II.

[12] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at p. 316

[13] Idem.

[14] A condensed but still very interesting account of *Raleigh's Case* 2 St. Tr. 1 (1603) may be found in Charles; Edward Lloyd *State Trials; Mary Queen of Scots, Walter Raleigh, Captain Kidd*, (Chicago, 1899).

It is because there are no law reports of ordinary criminal trials in the sixteenth and seventeenth centuries that the exceptional nature of the state trials has gone unnoticed.[16] The absence of criminal law reports from this period, where civil law reports exist, is itself telling. "Law reports are lawyer's literature, they do not develop where lawyers have no role."[17]

Where then did the lawyer–prosecutor come from and what was the process? A search for the answer begins in sixteenth century England when English criminal procedure acquired its modern form.[18] It was at this time that the "prosecutorial function began to crystallize into the rational and efficient institution of the modern law."[19] The person responsible in part for these changes was the justice of the peace.

The Justice of the Peace - Origins

"Justice of the Peace" was the official title of every magistrate[20] who was not a lawyer holding a full–time salaried appointment to act as such.[21] The latter were known as stipendiary magistrates. The expression "Justice of the Peace" goes back to antiquity,[22] and the title first appears in 1361.[23] The origin of the office has been traced to a proclamation issued in 1195 by Richard I whereby knights were assigned to "summon before themselves all males over the age of fourteen, and order them to swear that they would not be robbers, outlaws or thieves and that they would pursue all criminals when the ancient hue and cry was raised."[24] Some of these knights were also commissioned to assist the king's Justices in Eyre with "gaol delivery"—that is, by conducting the trials of suspected felons who were held in prison.[25] It is from these early duties of supervision of the local male population and assisting at court that the jurisdiction of the office developed. Justices of the peace were not lawyers, and generally were not legally trained; until well into the eighteenth century they were unpaid[26]

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[15] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at p. 316, Langbein maintains that "in the few contemporary sources which do purport to describe ordinary criminal trials…there is no prosecuting counsel." Ibid.

[16] Idem.

[17] Ibid., p. 316–317.

[18] John H. Langbein, *Prosecuting Crime in the Renaissance*, (Cambridge, Mass.: Harvard University Press, 1974), p. 1.

[19] Ibid., p. 2.

[20] A magistrate is a judicial officer who has local jurisdiction (usually summary) in matters of a criminal nature.

[21] Full–time salaried justices of the peace were known as stipendiary magistrates, they do not appear until the late eighteenth century. See Frank Milton, *The English Magistracy*, (London: Oxford University Press, 1967), P. 1.

[22] Idem.

Between the twelfth and the fifteenth centuries, their primary task was to keep the king's peace. During that period there was no clear distinction between their police–like functions and their judicial responsibilities.[27] Hence a justice of the peace wore two hats, firstly he was responsible to organize and arrange for such basic policing as existed and for the detention of suspected criminals. Then in his judicial role he was required to try the suspects in minor matters and in weightier ones to commit them to be dealt with at the Assizes.[28]

It was during the sixteenth century that justices of the peace came to play a key role in the investigation and prosecution of criminal offences. By that time their jurisdiction[29] included everything from initial investigation following a complaint through all the intermediate steps leading to trial: "Much of the justices' time was spent receiving and investigating complaints, calling witnesses before them and binding them over to appear at trial, examining accused persons and committing them to gaol or releasing them on bail, and attending sessions."[30]

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[23] Justices Of The Peace Act, 34 Edward III c. 1(1360–61).

[24] Milton, *The English Magistracy*, *supra* n. 21 at p. 3.

[25] Idem.

[26] Ibid., pp. 6–7, while they were entitled to be paid a set fee, most declined payment, viewing the job as one of civic responsibility.

[27] Milton, *The English Magistracy*, *supra* n. 21 at pp. 7–8.

[28] Idem.

[29] See J.H. Baker, "Criminal Courts and Procedure at Common Law", in J. S. Cockburn (ed.) *Crime in* (con't)

Many of the duties and responsibilities of the justices of the peace had developed over time through the common law and legislation.[31] Because there was relatively little legislation which set out their responsibilities in anything other than general terms,[32] procedural practices varied from county to county and by the middle of the sixteenth century serious abuses and problems had developed.[33] In order to remedy those problems, the Marian statutes were enacted in 1554 and 1555[34] as a result of which the prosecutorial function of justices of the peace took form and developed.[35]

England 1550–1800, (London: Methuen & Co. Ltd., 1977), p. 29 who indicates that the justices of the peace derived their authority from the commissions of the peace which were issued to a number of the knights and principal gentry in each county. By the terms of their appointments, they were to "make inquiries, issue warrants, take informations, and take recognizances to keep the peace." Ibid. See also Green, *Verdict According to Conscience*, *supra* n.5 at pp. 108–113.

[30] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 16. The word "sessions" here refers to quarter–sessions which was the quarterly gathering of the local justices of the peace at which time trials for the serious crimes which fell within their jurisdiction were held.. See ibid., p. 29 for a history of the quarter sessions and how they worked.

[31] See Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at pp. 319–20 and see Green, *Verdict According to Conscience*, *supra* n.5 at p. 112.

[32] See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 66–76, Langbein lists thirty statutes concerning justices of the peace, in existence prior to 1550 which dealt with particular subject matters such as vagabonds, wages, weights and measures, forgery, candlemaking and gaming to name but a few. However none of these statutes dealt with the specific procedure justices were to follow in the matters over which they presided. Ibid., p. 67.

[33] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18, Part I.

[34] These consisted of two statutes, the Bail Statute of 1554, and the Committal Statute of 1555. These will be discussed in detail below, see Langbein, ibid. at p. 255 for a text of both statutes.

[35] Green, *Verdict According to Conscience*, *supra* n.5 at p 111.

CHAPTER III

The Marian Statutes and Public Prosecutions

Historically, a public prosecution system employing a public prosecutor, never existed in England.[36] This left obvious gaps in the English system of criminal prosecutions because routine prosecutions, (which had no political overtones) were in law and practice, private. That is, they were personally conducted by the victim or aggrieved party because no person, official or otherwise, had been made responsible for the prosecution of crime.[37] Prior to the sixteenth century there had been no need for someone like a public or Crown prosecutor. Up to that time, once an accusation had been formally made or an indictment found, and the matter sent to court—the trial jury had taken over, investigated the matter, and reached its decision. But as juries stopped making their own enquiries[38] it fell upon someone else to do so.[39] While self-interest motivated the parties in civil matters, no equivalent motivation was at play concerning pleas of the Crown. In fact the situation was just the reverse because routine criminal prosecutions were conducted at the expense of the private prosecutor with all fines, penalties and proceeds resulting from conviction going to the Crown.[40] The Marian Statutes were thus enacted to remedy these as well as other and more serious problems which existed under the English system of private criminal prosecutions at the time.

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[36] The role of the attorney General as public prosecutor is examined in Chapter IV *supra*.

[37] Although all prosecutions for serious crime were pleas of the Crown prosecuted in the name of the monarch, in routine cases the monarch was never more than a nominal prosecutor. That is, while the proceedings were formally commenced in the name of the Crown, the monarch nor any of his or her agents took any active part in the prosecution itself. See Patrick Devlin, *The Criminal Prosecution in England*, (London: Oxford University Press, 1960), Chapter 1.

[38] See Chapter II *supra*.

[39] J.LlJ. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964) pp. 337–338.

[40] By the terms of *Magna Carta*, no man could be put on trial for his life without there first being an indictment found by the grand jury. Therefore in cases of felony (all of which were tried as capital offences), a complainant would first have to place his indictment and evidence before the grand jury. If the grand jury found a true bill, the matter went to trial where once again the evidence would be presented—all at the personal expense of the prosecutor. While the accused could be ordered to pay the costs of the proceedings, it was rarely the wealthy who were in the dock and few convicts had any money out of which to pay the prosecution expenses.

At the time the Marian Statutes[41] were passed, the justice of the peace had an extensive criminal jurisdiction including the trial of capital offences at quarter–sessions.[42] As well, he had important out–of–court responsibilities which far exceeded anything the local constable had,[43] including the ordering of arrest on suspicion alone, the committal of an accused to stand trial, the issuance of search warrants and the granting or withholding of bail on felony charges.[44]

It was with respect to the power of granting bail that serious abuses had developed, in consequence of which the Marian bail and committal statutes were enacted. Existing legislation was inadequate for the task because of certain procedural deficiencies which made it a simple matter for a dishonest justice to take a bribe, set his friends free or to be intimidated into granting bail.[45] Once released, it was a difficult task for the "amateur law enforcement agencies of the time" to recapture the bailed suspect if he or she took flight.[46] Such bailment abuses caused considerable problems for the judges of Assize who came into the jurisdiction with only a few days to conduct the various trial proceedings. Their schedules (together with those of the prosecutors and witnesses) were thrown into disorder because of the failure to appear of bailed suspects or bound over witnesses.[47]

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[41] 1 and 2 Philip & Mary c. 13 (1554–1555), and, 2 and 3 Philip & Mary, c. 10 (1555).

[42] See Smith, *De Republica Anglorum*, *supra* n. 6 at pp. 86–93 for an extensive listing of the justice of the peace's jurisdiction, duties and the proceedings at quarter–sessions.

[43] In *Prosecuting Crime in the Renaissance*, *supra* n.18 at at p. 6, Langbein indicates that the authority to take an active role in what we would regard as police business, coupled with the power of summary conviction for lesser matters is as old as the office of the justice of the peace. "During the centuries before the appearance of professional police, individual justices of the peace (and the constables and sheriffs over whom they became ascendant) policed the land." Ibid., See W. Blackstone, *Commentaries on the Laws of England*, (A Facsimile of the First Edition 1765–1769) (4 Vols.) (Chicago: University of Chicago Press, 1979), p. 289 for a description of the criminal law powers of the constable which included arrest without warrant in cases of breach of the peace, arrest on "probable cause" in cases of felony and the detention of the accused until they could be taken before the justice of the peace. See also Theodore.Plucknett, *A Concise History of the Common Law*, (London: Butterworth's, 1956), p. 87 for the history of the office of constable.

[44] See Smith, *De Republica Anglorum*, *supra* n. 6 at pp. 86–93.

[45] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 8.

[46] Idem.

Enactment of the Marian Statutes not only corrected these problems, but had the very important effect of changing the justice of the peace from an unpaid civil servant to an unpaid prosecuting official as well.

The Bail Statute, 1554

The beginning of this new prosecuting process was the Marian Act "which tightened the procedure for granting bail."[48] To remedy the abuses which had hitherto frustrated the holding of trials the statute ordered that "the justices granting bail examine the prisoner and 'them that bring him' and send the results of the examination in writing to the judges at the next gaol delivery."[49]

The bail statute established a procedure to be followed for all cases in which the justice granted bail to a person accused of felony. First the justice was required to take written depositions from the private prosecutor, arresting officer and any witnesses concerning the allegations against the suspected felon.[50] These depositions were then to be filed with the clerk at the court of Assize. In the event that the accused did not appear for the grand jury or trial proceedings, the supervising judges of gaol delivery would thus have a way to review the correctness of the bailment.[51] In those cases where the accused was not going to be released on bail,[52] but held in custody pending indictment and trial, no depositions were required as there was clearly no danger the prisoner would not be available when the time came.[53]

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[47] Ibid. Not only might the justice of the peace act improperly in bailing an accused, but he might also fail to take the proper steps with a reluctant witness or private prosecutor who, following the arrest, lost interest in the matter, or made private accommodations and no longer wanted to proceed. If they did not appear at the Assize, the case fell through and the accused was released.

[48] This was the first of the two Marion Statutes, "An Act appointing an Order to Justices of Peace for the Bailment of Prisoners," 1 & 2 Philip and Mary c. 13 (1554–1555). For a discussion of its provisions and the history leading up to its passage, see Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 6–15, the text of the statute may be found at p. 255 ibid.

[49] Green, *Verdict According to Conscience*, *supra* n.5 at p. 109. Gaol delivery was one of the commissions given to the justices of assize which required them to try the criminal cases including that of every prisoner being held in gaol pending his trial.

[50] See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 6–11.

Committal Statute, 1555

Within a year of the first statute, a second was enacted dealing with the pre–trial procedures to be followed by justices of the peace. This was the "Act to take the Examination of Prisoners suspected of Manslaughter or Felony".[54] That Act formalized the duties of the justice of the peace when acting as a Coroner[55] and required him to take depositions of the evidence in every case of manslaughter or felony whether or not the accused was to be admitted to bail.[56]

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[51] If the justice of the peace bailed wrongfully, he could be fined. Ibid.

[52] See Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at p. 321. When faced with an accusation of felony and after hearing the allegations made against an accused, in a weak case, the justice of the peace had no authority to discharge the accused from further proceedings. He could either release the accused on bail, binding him, together with the witnesses, over to the next assize, or he could commit the accused to prison to await trial. Only the Assize judges had the jurisdiction to unconditionally release or discharge someone accused of felony. See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 6–8.

[53] It is noteworthy that the statute which began the procedure for what is today the preliminary inquiry, started not as a means of testing the strength of the prosecutor's case, but as a check against abuses by the justices of the peace.

[54] 2 & 3 Philip and Mary c. 10 (1555).

[55] Coroners were required by law to investigate every case of suspicious or sudden death. The institution is traced back to 1194, and the earliest authority to consider them is Bracton who discusses the Coroners Statute of 1276. See James F. Stephen, *A History of the Criminal Law of England*, (Vol. 1) (New York: Burt Franklin Publishing, 1964), p. 217. Coroners were the first to conduct what today would be similar in purpose to a preliminary inquiry. When conducted by the coroner, it was called an inquest and operated in similar fashion to a grand jury. Witnesses were called, evidence concerning the deceased's death was heard and, following their deliberations, the jury of inquest delivered its verdict. This could be accidental death or death due to natural causes or felonious slaying. In the latter event, the coroner issued an "inquisition" which had the same effect as an indictment found by the grand jury. The persons accused of the felonious slaying would be tried at the next Assizes on the basis of the coroner's inquisition. Ibid., p. 217–219. The coroner's inquest and subsequent trial on the inquisition might be separated by a lengthy time interval. This was not the case for indictments found by grand juries. The trials brought on by these instruments would be held during the sitting in which they were brought, often on the same day so there was usually no difficulty with witnesses who were already present because of their appearance before the grand jury. See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 13-14.

It was when there was to be a trial on a coroner's inquisition that difficulties often arose. When "the trial jury was to act on an indictment taken by a coroner weeks or months before, usually in some other county (con't)

By the sixteenth century justices of the peace were far more numerous and more familiar as keeper's of the peace than were those persons acting as coroners.[57] For that reason they were often the first individuals approached after a homicide had been discovered and increasingly, they took an active part in the investigation and inquest of such cases.[58] Following an inquest where an inquisition was issued coroners were required to arrange for the necessary witnesses at the trial, *and* be in attendance themselves. This requirement also applied to justices of the peace when acting as coroners. As a result of their role as corners, justices of the peace became quite familiar with investigative techniques and the taking of depositions as well as the organizational role respecting the prosecution of coroners inquisitions.[59]

The Marian Committal Statute not only extended pre–trial examinations and depositions to those accused who were not bailed, but, more importantly for our purposes, it required the justice of the peace to bind–over witnesses to appear at trial in order to give evidence against the accused. [60] It was in the latter requirement that there was a clear directive to the justice of the peace to play an active prosecutorial role.[61]

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there was a problem that we might term management of the prosecution. Some agency was necessary to produce the witnesses again at gaol delivery." Id., p. 14. This was the role taken up by the justice of the peace under the committal statute.

[56] See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 15–20.

[57] Id., pp. 14–15.

[58] Idem.

[59] Idem. See also n. 55 *supra*.

[60] See Green, *Verdict According to Conscience*, *supra* n.5 at p. 110; the statute also authorized depositions to be taken from all witnesses as well.

[61] By law a private prosecutor was required in every criminal prosecution. The monarch was not formally represented in routine prosecutions and unless a private citizen was both named in the court records as prosecutor and appeared before the grand jury and at trial to prosecute, the prosecution could not proceed and the accused person was discharged. When a felony or manslaughter was reported to the justice of the peace, (con't)

In those cases in which the private prosecutor was unwilling or unable to do so, it now fell to the justice of the peace to organize the prosecution case for the Assize and to ensure that the necessary witnesses to establish the Crown's case were on hand.[62]

It was because crime in England was privately prosecuted, albeit in the name of the Monarch, that this system of prosecutions could develop comparatively easily, for "the Marian [justice of the peace] was filling the gaps in a system of citizen prosecution."[63] In many cases "he could limit himself to binding over aggrieved citizens to prosecute in their own causes", but in other cases, he might investigate, prepare the case, bind over the necessary witnesses and prosecute or supervise the prosecution at trial.[64] Thus we see the beginning of England's first public prosecutor. The justice of the peace was never formally designated as such but that was a task he often performed. Otherwise private prosecutions would not necessarily have followed in all reported cases of felony brought to the attention of the justice.[65] The prime objective of the Marian committal statute was to encourage the justice to take a more active role in criminal proceedings. In doing so he came to play what

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there would often be no one willing or able to act as the prosecutor. In such cases, following the investigation and preliminary inquiry, the justice would designate one of the witnesses, usually the complainant as the formal prosecutor and bind the person over to appear at the Assize. There such persons appeared in the dual capacity of prosecutor and witness. See Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at pp. 321–322. The choice the accusor/complainant previously had of whether or not to act as the prosecutor was through the intervention of the justice of the peace transformed from "option to obligation". The prosecutor (accusor/complainant) together with the witnesses had no choice except to appear at the Assizes on pain of forfeiting the bonds they were required to enter into by the justice investigating the case. See Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 35.

[62] *Prosecuting Crime in the Renaissance*, *supra* n.18, Chapter 2. In that chapter Langbein demonstrates that the Marion statutes were intended to establish a preliminary inquiry system, and to set up the justice of the peace as a public prosecutor to organize the case for the Crown before the grand jury and at trial. In "The Origins of Public Prosecution at Common Law" *supra* n. 1 at at p. 321, Langbein says that the committal statute "turned the pre–trial investigation into a device for the production of prosecution evidence at trial in every case of felony in the realm."

[63] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 39.

[64] Idem.

[65] There may have been no one willing or able to assume the responsibility of private prosecutor in particular cases. If the prosecution were to proceed, it required the active intervention and organization of the justice to bring it about. See ibid. pp. 23–24.

would today be a combined role of investigating police officer and Crown prosecutor.[66]

Pre–Trial Criminal Procedure After 1555

While Sir Thomas Smith has provided a contemporary account of a criminal trial in the period following the Marian Statutes,[67] there is no similar account of the proceedings before the justice. What was the pre–trial criminal procedure like in the era following the Marian Statutes? What was the nature of the role played by the justice of the peace from the time he first received a complaint through to the trial on the indictment?

The criminal trial process began with the formal laying of a complaint or information before a justice of the peace. This could be done by any citizen.[68] If necessary, a warrant was issued for the arrest of the accused. It was required that within three days of an arrest, the prisoner must be brought before a justice of the peace.. Any detention beyond that time was actionable as false imprisonment.[69] Once the accused was on hand (usually in the company of the arresting officer, the complainant and witnesses), the evidence against him was presented and tested:[70] "If it appeared that a felony had been committed, the justice had no authority to release the accused, but was to write down 'the examination of the said prisoner, and information of them that bring him, of the fact and circumstances thereof' for certification to the next gaol delivery."[71] The justice of the peace was then to bind over the complainant to the next Assizes, to prosecute and give evidence, together with any other witnesses. The accused was to be committed to gaol by warrant, or released on bail and bound over to appear at the Assizes before the grand jury.

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[66] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 24. Langbein here enumerates the four identifiable objects of the committal statute; these were, first; to bestir the justice of the peace to investigate allegations of serious crime, second; to have the justice of the peace discover the necessary witness and arrange to have them at trial, third; to become familiar with the details of the case, so that where necessary at trial, he could supply the facts himself, "to give the prosecution cohesion," and fourth; in difficult cases to assist the assize judge by supplying him in advance, with a summary of the case.

[67] Smith, *De Republica Anglorum*, *supra* n. 6 at pp. 94–103.

[68] See Desmond H. Brown, *The Canadian Criminal Code 1892: A Comparative Study in Codification*, Doctoral Dissertation for the degree of Doctor of Philosophy, University of Alberta, 1986, (to be published by University of Toronto Books, 1987) pp. 77–80.

[69] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p.32.

[70] While the committal statute did not expressly require a wider investigation than an examination of the persons bringing the accused, such an investigation was implicit in the statute's procedure and was often taken. Justices regularly entered upon very thorough investigations, issuing search and arrest warrants, (for execution both by constables and private citizens) as part of their preparations of the Crown's case. John H. Langbein, "Shaping the Eighteenth Century Criminal Trial: A View From the Ryder Sources" (1983) 50 *University of Chicago Law Review*, p. 57.

A single justice could not bail an accused in a case of felony; that required two justices sitting together,[72] but when so paired they could release for any offence excepting arson, murder or treason "so long as the guilt was not virtually certain (as where the accused confessed or was taken red handed)."[73]

Where there was a committal for trial, the justice of the peace was to deliver the bail certificate if there was one, the depositions of the witnesses heard, and any other documents to the clerks of Assize.[74] Those documents would be used to draft the indictment that was to go before the grand jury, as well as to prepare a trial schedule, together with a list of those bound over to prosecute and give evidence.[75]

At the Assize, the criminal proceedings were conducted separately from the civil. Once the grand jury had been sworn, they were given the indictments they were to consider. Following this, the prosecutor and witnesses were called and sworn and sent into the grand jury room as required.[76] The grand jury proceedings were held in camera and while they continued their deliberations in secret, in another place in open court the trials on the indictments previously found by the grand jury to be true bills, took place.before a judge and jury.[77] From time to time, the grand jury would interrupt its proceedings so that it could bring forward the fresh indictments which had been found. These were given to the court officials who then made them available as needed to the trial court so that the trial process could continue.[78]

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[71] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 32–33.

[72] Idem.

[73] Ibid. See also Sir Fredrick Pollock and Frederic W. Maitland, *History of English Law*, (2nd ed.) (Cambridge: University Press, 1968) (2 Vols.), Chapter 1.

[74] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at pp. 32–33. See also Brown, *The Canadian Criminal Code 1892*, *supra* n.68 at pp. 79–80 and Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 34–35 who indicates that the documents would also be available for use by the court at trial—though not as evidence.

[75] Idem.

The jury trial process had by this time evolved from its earlier active, self–informing practice[79] in order to accommodate a passive jury which was no longer expected to be knowledgeable about the matters brought before it.[80] The form the trial took was an instructional proceeding, the forerunner of the modern trial, in which witnesses began to be called to give evidence for the purpose of informing the jury to enable it to reach a verdict.[81] By the mid–sixteenth century examination of individual witnesses had become a regular feature of the jury trial.[82] In those cases where a justice of the peace had organized the prosecution, the trial before the jury resembled the preliminary inquiry conducted by the justice of the peace, restaged for the jury's benefit.[83] The justice of the peace, having had the benefit of his pre–trial examinations, now re–enacted the material parts by interrogating the witnesses before the jury.[84] In those cases where the necessary witnesses failed to appear or where the justice of the peace had played a major role in developing the case, "the justice who had got up the case was the principal witness against the prisoner, and detailed at length the steps he had taken to apprehend him."[85] The private prosecutor and other witnesses who had been bound over also gave their evidence in open court where their depositions were now available with which to either prompt or examine them.[86]

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[76] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 33.

[77] Idem.

[78] Idem.

[79] See Chapter II "The Trial Jury—From Active to Passive" *supra*.

[80] See Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at pp. 332–334; It would appear that by 1624, at the latest, the grand jury (and quite probably the trial jury) were not expected to be self–informing. On the contrary, in one case, Trat's Murder, the trial judge took steps to ensure that no one on the trial jury was related to or acquainted with the accused, so they might be quite impartial when hearing the evidence. Ibid., p. 332.

[81] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 125. See also Chapter II *supra*, "The Trial Jury—From Active to Passive".

[82] At this time witness examinations were conducted by the presiding judge, see Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 125.

[83] Idem.

In the pre–counsel era, it was usual for the accused to cross–examine prosecution witnesses and to call and examine witnesses on his own, but so long as the accused was without counsel, "there was scarcely any possibility of distinguishing the accused's role as defender and as witness."[87] It was expected that the accused would reply to any evidence that was brought against him, usually as it arose.[88]

As a result of the Marian statutes, the jury was now able in most felony trials to witness the testing of the accused's story,[89] for he could no longer "tell an elaborate tale and then reply to all skeptical queries with mere repetitions of his side of the case."[90] The defendant's story was now subject to effective scrutiny because of the depositions taken by the justice of the peace when the matter was fresh in the minds of the witnesses.[91] As a result prosecutions were being more effectively organized and conducted on behalf of the Crown than theretofore.

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[84] Idem.

[85] Stephen, *History of the Criminal Law of England*, (Vol. 1) *supra* n. 55 at pp. 222–223 and see also Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 39, and Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 36. A deposition which was immediately transcribed and signed by the declarant could itself be used as evidence, whereas initially, the documents resulting from the pre–trial examinations by the justice of the peace were "principally intended to buttress the oral performance of the justice of the peace at the trial . . . a sort of file memorandum for the justice of the peace", ibid.

[86] Green, *Verdict According to Conscience*, *supra* n.5 at p. 110; The written depositions were not evidence in the trial but they were "useful in co–ordinating and sustaining the case for the prosecution." ibid.

[87] Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at, p. 283.

[88] Ibid., examples of this type of exchange can be found in the State Trials transcripts, or in Smith, *De Republica Anglorum*, *supra* n. 6 at pp. 94–103.

[89] Green, *Verdict According to Conscience*, *supra* n.5 at p. 110; it will be recalled that not only did the justice of the peace examine the complainant (prosecutor) and witnesses, but as well he examined the defendant, who's story as he gave it at the time, was recorded as part of the depositions in the case. When considering the rapidity of Old Bailey trials in the pre–defence counsel era (as many as twenty in a day—by the same jury), it should be recalled that in every instance, the jury had access to the testimony of the accused—in reply to the evidence raised against him. See Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at, p. 284 and Hay, "The Criminal Prosecutor in England and its Historians", *supra* n. 4 at p. 4.

The Justice of the Peace as Prosecutor

The question remains as to why the investigatory-prosecutorial role was left with the justice of the peace? It is now clear that the role of the justice of the peace with respect to the investigation and prosecution of a criminal charge developed in response to the increasing passivity of the grand and trial juries.[92]

The development of the prosecuting justice was not the first nor the only answer to the effective investigation and prosecution of crime.[93] Among other answers, the Crown adopted the reward system, or *qui tam* actions which awarded private prosecutors in certain classes of criminal offences a share of the fine upon conviction.[94] This was one of the most revealing solutions showing as it did the extent to which the Crown was willing to go to avoid having to establish a costly, centralized, professional organization of Crown prosecutors.[95] While this scheme had at first to be regulated to control abuses and later to be abandoned altogether because of ineffectiveness, it served to highlight the two central themes which motivated the Marian and related statutes; prosecutions should be local to draw upon local knowledge and they "should be cheap costing the Crown as little as possible."[96] It was not surprising, therefore, that the justice of the peace was chosen to supervise prosecutions and not some other local person or institution. This solution to the need for effective supervision and prosecution of criminal charges was to last for two hundred years. It must be remembered that the justice of the peace was never officially designated as the public prosecutor. He operated within a system that recognized the absolute right of a citizen to prosecute another for a criminal offence, subject only to the very remote possibility of intervention by the Monarch, through the Attorney General.[97] His role therefore, was to give cohesion and stability to an otherwise ad–hoc system of private prosecutions for crime.

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[90] Idem.

[91] Idem.

[92] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at pp. 334–335, and see Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at pp. 43–45 and 118–122; "For serious crime the initiative had shifted to the [justices of the peace] who organized detection, detention and prosecution, and who controlled the framing of bills of indictment....the [grand] jurors' role was indictment not presentment. The Marion legislation had resolved the issue of who was going to take up the task of investigating and prosecuting crime now that the grand jury no longer did so. Ibid.

[93] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at p. 335.

[94] Idem.

[95] Langbein, *Prosecuting Crime in the Renaissance*, *supra* n.18 at p. 44, see also Langbein, "The Origins (con't)

The Decline Of The Justice Of The Peace As Public Prosecutor

While some answers have now been provided to the query concerning the common law origin of the public prosecutor, there still remains the question of the involvement of lawyers in ordinary criminal prosecutions and how that began. The decline of the justice's role, the involvement of lawyers in routine criminal prosecutions, and the emergence of "official" public prosecutors in England concerned developments that would take place in the 430 years following the passage of the Marian statutes.[98]

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of Public Prosecution at Common Law" *supra* n. 1 at p. 335; it must be remembered that in the main, justices of the peace were *not* paid for their work, see Milton, *The English Magistracy*, *supra* n. 21 at pp. 5–8.

[96] Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 1 at p. 335.

[97] See Douglas Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* 165–186, p. 177ff.

[98] These changes occurred over a period of 430 years, from the passage of the Marion Committal Statute in 1555 to the enactment of the *Prosecutions of Offences Act 1985* c. 23 (Eng.). The latter act is discussed below.

Until 1730, the justice of the peace remained secure in his role as unofficial public prosecutor. But from approximately 1730 to 1775, his role as prosecutor began to be assumed by other other participants in the legal process.

Two factors were to play a leading part in the decline of the prosecuting justice. These were firstly, that an accused charged with felony was not allowed legal counsel at his trial, and secondly, the abuses which resulted from the "reward" and the "Crown witness"[99] systems in regular use at this time. To counter these problems the courts began permitting the accused to have lawyers at trial. This in turn gave rise to the need for legally trained counsel to prosecute, thereby reducing the role of the justice as prosecutor.

Counsel for the Accused

Until the 1750's, prisoners indicted for most felonies were denied legal representation unless a point of law arose upon the pleadings or the evidence.[100] The rule did not apply to misdemeanours or to the ancient appeal of felony which had the form of a civil proceeding.[101] Medieval and later authorities held that the judge bore the responsibility for seeing that the proceedings were properly conducted,[102] believing that "trials would take too long if men of law were allowed; no one could better speak about the facts than the prisoner himself."[103]They also believed that in capital cases, the evidence against the prisoner should be so clear it could not be refuted, and that when a party conducted his own defence, his conscience would move him to tell the truth.[104] The prisoner's countenance and gestures, his speech and replies—all would assist the jury in discerning the truth of the matter, which would not be the case if the accused was represented by counsel.[105] However these views were not universally accepted and "at least as early as the sixteenth century,[106] and throughout the seventeenth century, defendants in political trials were complaining of the disparity that resulted when the prosecution was represented by counsel while the defence was denied it."[107]

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[99] A "Crown witness" was one guilty of felony, who had purchased an immunity from prosecution in return for incriminating information and testimony against other felons. This system is discussed in detail below.

[100] Baker, "Criminal Courts and Procedure at Common Law"; *supra* n. 29 at pp. 36–37

[101] Ibid., p. 37.

[102] In Stephen, *History of the Criminal Law of England*, (Vol. 1) *supra* n. 55 at p. 284, it was said to be the duty of the trial judge as counsel for the prisoner to point out flaws or defects in the indictment. See also Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at, pp. 307–308 and Smith, *De Republica Anglorum*, *supra* n. 6 at p. 94ff. These sources seem to establish that on occasion, the trial judge engaged in sustained questioning of witnesses and was expected to act as counsel for the accused as required.

There were some limitations to the rule forbidding defence counsel. For example, it only applied in cases of felony and treason. Oddly, an accused could be represented in misdemeanours but not for crimes in which his life was at stake![108] Additionally, by the Treason Act of 1696[109] prisoners indicted for treason were given a right to counsel for matters of fact as well as of law.[110] Apart from this the accused continued to be denied counsel down to the time of Hawkins, who, writing in 1721, said that; "everyone of Common Understanding, may as properly speak to a Matter of Fact as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defence, which in cases of this Kind is always the best..."[111]

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[103] "The accused was not competent to give evidence on oath, but his speech would serve the same purpose and it was desirable that he should deliver it in person; the prisoner's own account of himself would certainly weigh heavily with the jury." Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 37.

[104] Idem.

[105] Idem.

[106] S.F.C. Milsom, *Historical Foundations of the Common Law*, (London: Butterworth's, 1981), p. 413. In criminal trials in the fifteenth century, counsel appear to have been allowed for strictly legal argument. See also Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at pp. 308–309.

[107] Langbein, ibid. p. 307.

[108] Ibid., p. 308. Misdemeanours are traced back to actions in trespass which were originally civil actions. One branch became crimes--misdemeanours, the other, torts or civil crimes. But the civil procedure remained for both branches. See Kenny's, *Outlines of the Criminal Law* J. W. Cecil Turner (ed.) (Cambridge: University Press, 1952) pp. 97–98. The issues in misdemeanour cases turned on questions of property ownership and property rights—areas in which lawyers were expert and it would have been difficult to prevent the accused having their help. Ibid. I am indebted to Dr. Brown of the University of Alberta for drawing the reference from Kenny to my attention.

[109] 7 & 8 Wm III.3 c. 3 s. 1.

[110] Ibid., see also Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at pp. 37–38.

Denial of counsel to the accused in ordinary felony cases was no longer supportable after the exception had been made for treason cases, and in the thirty–five years following the Treason Act, the old rule began to change.

It will be recalled that in state trials, the Crown was represented by counsel—usually the Attorney General, but in ordinary prosecutions, Crown counsel were rarely involved. Why then were defence counsel allowed when there was no prosecution counsel?[112] The answer concerns abuses in the reward and Crown–witness systems which were introduced to further facilitate criminal prosecutions.

The Reward Statutes

Beginning in 1692, parliament enacted a series of statutes whereby those who came forward to accuse and prosecute certain classes of criminals were paid a premium for doing so upon the conviction of those accused.[113] This system, which quickly became suspect by the courts, fell into national disrepute when the Macdanial scandal came to light.[114]

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[111] William Hawkins, *Pleas of the Crown*, (London: Professional Books, 1973) (Vol. 2) being a reprint of *A Treatise of the Pleas Of The Crown*, (Savoy, 1721), p. 400. Hawkins, in referring to "cases of this kind" is speaking of treason and felony.

[112] These were usually murder cases where the victim's family prosecuted "but chose to delegate such unpleasant business to counsel." Prior to the 1730's prosecution counsel appeared in ordinary felony cases only under exceptional circumstances. Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at pp. 311–312.

[113] See John H. Langbein, "Shaping the Eighteenth Century Criminal Trial: A View From the Ryder Sources" (1983) 50 *University of Chicago Law Review*, pp. 106–110. In addition to statutory rewards, the reward method was used by the Crown to solve specific cases, as well as by private parties, government departments, local authorities and private associations for the prosecution of crime, Ibid.

[114] Idem.

Macdanial and his gang were in the business of falsely accusing people of felony and sending them to their death on perjured testimony for the reward money.[115] As a result of the revelations which came out during the trials of the Macdanial gang, the reward system was put under a permanent cloud of suspicion in the mind of the public and served to confirm the views of an already skeptical criminal trial bench.[116]

The Crown Witness System

By the 1750's, gang crimes; robberies and thefts committed by groups of criminals, were causing major problems to the relatively primitive law enforcement system of the time.[117] These offenders were hard to capture and bring to justice because there was no organized police force to investigate or go in pursuit, and because the gangs selected weak or undefended victims.[118] One method adopted by the justices of the peace to deal with the gangs (and perhaps the only one available to them), was the "Crown–Witness" system.[119]

On occasion, a felon would be caught, arrested and brought before the justice of the peace charged with a capital offence. On condition that he first confess his own crime and then identify, accuse, and later testify against his accomplices or partners in the gang; the justice of the peace would offer the accused immunity from prosecution.[120] Because such an offer often meant the difference between life and death, it was usually taken up. Provided the accused implicated others in the gang and testified at their trial, upon completion of the trial, the "crown witness" was free to go whether or not there had been a conviction against the partner or accomplices.[121]

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[115] Ibid., pp. 110–115.

[116] Idem.

[117] Langbein,"Shaping the Eighteenth Century Criminal Trial", *supra* n. 113 at pp. 84–85.

[118] Ibid., pp. 82–91.

[119] Idem.

[120] Idem.

As might be expected, there were problems with the crown-witness system.[122] A man caught red–handed and charged with a capital offence might be prepared to say anything and blame anyone in the hope of saving himself,[123] and although "irresistibly convenient to the hard pressed urban magistracy, the crown–witness procedure had grievous shortcomings."[124] Hence the criminal trial bench was increasingly suspicious of crown–witnesses as well as those prosecuting and testifying for the reward money and consequently it began to make changes to protect accused persons.

Because of the fundamental weaknesses in the pre–trial procedure—the lack of an organized police force, the absence of a professionally trained set of prosecutors for ordinary criminal trials—the pre–trial process began to affect trial procedure;[125] and the change in criminal trial procedure affected the type of person required to prosecute at trial. In Langbein's words:

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[121] Langbein,"Shaping the Eighteenth Century Criminal Trial", *supra* n. 113 at pp. 91–96; The crown–witness system was an eighteenth century adaptation of the old "approver system" whereby an accused who was proceeded against under the ancient appeal of felony who wanted to take advantage of the approver system, would first confess and plead guilty to the crime at his trial and then ask to "approve" others (name his accomplices or other felons). If these were found, tried and convicted, the approver was sentenced for his crime (usually to death) but then he was given a pardon and set free. If the accomplices or other felons named by the approver were not prosecuted, or if prosecuted, were acquitted at trial, the approver was hung on the strength of the confession and guilty plea he had made at his own trial. Because there was a great risk of failure, few of those appealed of felony, used the approver system to try to escape the noose—preferring their chances of settlement or at worst of the ordeal. Under the crown–witness system, the confession made by the accused was a pre–trial confession which could be recanted later The bargain was struck with the justice of the peace who made a grant of non–prosecution so that the crown–witness was never indicted, never under any threat of conviction and never in danger provided he kept his agreement. A conviction of his accomplices or partners was not a requirement of the bargain. Ibid.

[122] It is interesting to note that abuses of the reward system were uncovered as a result of one of the Macdanial gang being caught in an unrelated felony charge and offering to turn "an evidence" in return for immunity from prosecution.See Langbein,"Shaping the Eighteenth Century Criminal Trial", *supra* n. 113 at pp. 112–113.

[123] Langbein argues that the crown–witness system gave rise to both the accomplice/corroboration rule and the confessions rule in the law of evidence. See ibid. pp. 91–105.

[124] Ibid. p. 86.

[125] Ibid. pp. 130–134.

> By refusing to professionalize the work of detection and investigation, the English had made themselves dependent upon crown witnesses and reward seekers. As the dangers of these devices came to be appreciated, the courts undertook to make repairs at the level of trial procedure. The Courts admitted defence lawyers, initially for the sole purpose of helping the criminal accused probe prosecution evidence. And the courts began to develop rules of evidence, such as the corroboration rule and the confession rule, designed to prevent the riskiest kinds of prosecution from going forward.[126]

In the thirty year period following the Macdanial revelations of 1754–56,[127] defence counsel were regularly allowed in criminal trials and after a time, appeared almost as a matter of course.[128] The reason for this departure from precedent appears to be that the traditional discretion of the trial judge to control the court proceedings was used in piecemeal fashion to justify a departure from the old rule.[129] At the time it was "not foreseen that the power to admit [defence counsel] could not be kept perpetually in judicial discretion as the precedents accreted."[130]

While the accused had always had the right to remain silent, it was not until this point in time that the right became operative. Prior to this the accused was expected to conduct his own defence and to answer the evidence as it was presented. From the perspective of the prisoners dock, one of the initial advantages of legal representation in criminal trials was that it silenced the accused; "no longer did the jury expect to hear satisfactory explanations from the defendant's own lips, and his counsel could run defences which the accused in person could never have got away with."[131]

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[126] Ibid., p. 133. It was the abuses of the reward system and the cloud of suspicion this cast over professional thief–takers—persons who were in the business of capturing thieves, and who often worked in conjunction with the justices of the peace—which was the initiating cause in the development of a professional police force in England. Ibid., pp. 113–114.

[127] Langbein,"Shaping the Eighteenth Century Criminal Trial", *supra* n. 113 at pp. 112–114.

[128] Langbein, "The Criminal Trial Before the Lawyers", *supra* n. 5 at p. 313. Defence counsel continued to be prohibited from addressing the jury in summation until the rule was abolished by 6 & 7 Geo. 4, c. 114 in 1836.

[129] Ibid., p. 314.

[130] It was not until 1836 that there was statutory authority which allowed an accused a full defence by counsel in criminal cases. See James Bradley Thayer, *A Preliminary Treatise On Evidence At The Common Law*, (Boston: Little Brown and Company, 1898), p. 161.

It was because of this new ability on the part of the accused to successfully defend himself through counsel, that counter measures were required for the prosecution. From approximately 1775 to 1850, two important developments respecting public prosecutions in England took place. The first is that with the urbanization and industrialization of England in the eighteenth and early nineteenth centuries, the volume of work to be handled by the justices of the peace grew so rapidly[132] that they could no longer spend the necessary time to properly investigate serious crimes. That function was taken up by the professional police forces which were being organized and set up in the urban centres after 1829.[133] The second development was that with legal representation being allowed to the accused in felony cases, it became necessary for the prosecution to also be legally represented if its case was not to founder on technical grounds or for other reasons that legally trained prosecutors could have avoided.

There would be no legislative remedy similar to the Marian statutes to meet the changed conditions. Instead there was a transition period during which, at first, private associations, and later the police, took up the role of being unofficial public prosecutors.[134] Hence by 1850[135] the role of the justice of the peace as public prosecutor in England had ended.

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[131] Baker, "Criminal Courts and Procedure at Common Law", *supra* n. 29 at p. 38.

[132] See generally Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 172–175.

[133] Idem.

[134] Until the *Prosecution of Offences Act 1985* was passed in England, prosecutions for criminal offences were in constitutional theory private prosecutions; see, *R. v. Metropolitan Police Commissioner, Ex parte Blackburn*, (1968) 1 All E. R. 763 (C.A.). This transition period is discussed in the next section.

[135] See Philip B. Kurland and D.W.M. Waters, "Public Prosecutions in England 1854–79: An Essay In English Legislative History" (1959) 4 *Duke Law Journal*, 493–562, pp. 495–496.

The Transition Period 1750-1875

In England, although criminal actions were brought in the name of the Crown, non–political prosecutions for crime had always been considered private matters[136] While the justice of the peace investigated, directed and supervised criminal proceedings; when actually assisting with the prosecution of the offence before the grand or trial juries, he had no greater authority than any private citizen.[137] In most cases, the justice of the peace had bound some individual over—usually the complainant—to prosecute the matter. This person became the private prosecutor who, by law, was in charge of the prosecution. As the person responsible for the initiation and conduct of the proceedings he was held personally liable for all of the costs involved in the matter.[138]

In cases taken to the Crown court on indictment, the expenses could be considerable and were themselves a deterrent to prosecutions being brought. In those cases where a justice of the peace had conducted the investigation (perhaps with the assistance of the local constable) and later assisted with the conduct of the prosecution at trial, the expenses were reduced.[139] However after 1750, as the justices of the peace began to disassociate themselves from the investigative and prosecution aspects of the criminal complaint, a gap in the system of criminal prosecutions was created. For that reason, there was a transition period between 1750 and 1875 during which various forms of private prosecutions for crime were experimented with. By the end of the transition period, the gap left by the justices was filled by the police who emerged as the next agency by which criminal prosecutions are conducted.

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[136] There is no doubt that the right of private prosecution for crime in England, was a constitutional cornerstone in the eighteenth and nineteenth centuries. The private prosecutor is discussed in detail below.

[137] See Ibid., and see "The Justice Of The Peace Becomes The Unofficial Public Prosecutor 1550–1750," *supra.*

[138] See Stephen, *History of the Criminal Law of England,* (Vol. 1) *supra* n. 55 at p. 498.

[139] Where the justice of the peace took the complaint and then directed the investigation using his own resources or those of the village constable there would be few fees to pay apart from the court process fees. However, once counsel became involved and the number of witnesses increased and the trials lengthened, the costs grew proportionally.

Private Prosecutors

As far back as the Norman Conquest and possibly even earlier, criminal actions were privately prosecuted by the victim or their kin, personally or through an agent. While the justice of the peace had become the unofficial public prosecutor in the two centuries following the Marian statutes, his exercise of this function never abrogated the absolute right of a subject to institute criminal proceedings against another. If the justice was active in his role it was because victims of crime could not afford to prosecute, or settled their differences out of court; but not because the private prosecutor no longer had the right to prosecute. The justice prosecuted in addition to the private prosecutors not to their exclusion. As for the Attorney General, he played no detectable role in ordinary criminal prosecutions.[140]

Therefore, "it invites confusion to suggest that the English Attorney General since the mid–eighteenth century has held a virtual monopoly 'to deal with the prosecution of offences under [English] law'."[141] It would be pointless to search for authorities concerning the right of private prosecution because, "the right of any private citizen to initiate and conduct a prosecution through to conviction, whether he was the victim or not, was so constantly exercised in the eighteenth century that it needed no comment. It was in fact the paradigm of prosecution."[142] This is born out by the fact that in the second half of the eighteenth century over 80% of indictable offences tried by judge and jury, were prosecuted privately.[143] Fewer than one per cent of the total were prosecuted by the Attorney General or his agents, and these cases were comprised almost entirely of state trials for treason or seditious libel.[144]

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[140] See Langbein,"Shaping the Eighteenth Century Criminal Trial", *supra* n. 113.

[141] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 167, Hay refers to statements made by Wells, C.J.O., in *R. v. Smythe* (1971) 3 C.C.C. (2d) 97 at pp. 109–110, which was affirmed on appeal to the Ont. C.A., (1971) 3 C.C.C. (2d) 122 and affirmed on further appeal to the Supreme Court of Canada, (1971) 3 C.C.C. (2d) 366.

Private prosecutions for crime continued into the nineteenth century in line with the strongly held belief that the right to "private prosecution was an essential constitutional safeguard against possible executive tyranny."[145] This view ensured that prior to 1900 there were no significant controls placed on the private prosecutor other than those exercised by the grand and trial juries, to a lesser extent by the justices of the peace , and by the highly unlikely possibility that the Attorney General might intervene.[146]

The Rights of Prosecution

There is little doubt that in nineteenth century England as before that time, a private prosecution for crime was in the hands of the prosecutor in the same fashion as a civil suit would have been. Beyond the general right to bring such a prosecution, what were the private prosecutors' rights *qua* prosecutor? In conducting the litigation the private prosecutor could exercise discretion at many crucial points. Often he could choose the charge to go on the indictment, and it was possible to have the indictment drafted by the prosecutor's own lawyer on instructions from the prosecutor,[147] who could also influence the decision as to which witnesses were to appear before the committing magistrate or the grand jury.[148] Indeed, he could by–pass the justice of the peace altogether and go before the grand jury with what came to be known as a "voluntary bill."[149] Where this was done, it was possible to "seek an indictment for any offence and construct a case [before the grand jury] without the accused even being aware that proceedings had begun."[150]

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[142] Hay, ibid. p. 167.

[143] Ibid. Hay indicates that most of the remaining 20% were also prosecuted by private citizens who happened to have occupied the position of parish constable and who were bound over by the justices of the peace to prosecute because the victim was too poor, or for other reasons.

[144] Ibid., pp. 167–168, The state trials for seditious libel, which were far more numerous than the trials for treason, were usually prosecuted (in the eighteenth and nineteenth centuries) by the Attorney General using his unique privilege of prosecuting serious misdemeanours by filing an *ex officio* information in King's Bench. "This procedure eliminated the grand jury, could allow the careful packing of a special jury, and saddled the defendant with heavy costs even if the Crown lost." Ibid.

[145] Hay, "The Criminal Prosecutor in England and its Historians", *supra* n. 4 at p. 10.

[146] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 172, 177.

The private prosecutor could also, for his own reasons, decide to discontinue the prosecution without any official explanation being required of him.[151] In the case of a voluntary bill the prosecution could be abandoned without penalty because there were no recognizances. In the event the prosecutor had been bound over to prosecute following a preliminary inquiry, he could forfeit the bond he was to pay in default of prosecution;[152] or, with a little ingenuity, he might convince the grand jury to dismiss the charge.[153]

The private prosecutor could also strongly influence the outcome of a jury trial by virtue of the instructions he issued through his solicitor to the barrister prosecuting the case in court.[154] The instructions could include directions on what charge to prefer when drafting the indictment, which of several witnesses to call at the trial, specific questions to ask of potential defence witnesses, and the like. The barrister could thus be instructed by the private prosecutor "to conduct the case in the manner most likely to yield the outcome wished".[155]

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[147] Ibid, p. 168–169, see also p. 5 where it is noted that in spite of the Marion statutes, following their order of committal, justices of the peace widely extended discretion to private prosecutors to frame their own charges on the indictments which were to go before the grand jury.

[148] See ibid., pp. 168–169.

[149] Idem.

[150] Ibid., p. 169, 177. See also Brown, *The Canadian Criminal Code 1892*, *supra* n. 68 at p. 91, n. 144, for an example of this occurring.

[151] Ibid., p. 169.

[152] Where a private prosecutor being bound over to prosecute, fails to appear at trial (having settled the matter privately), it is undoubtedly the law that the magistrate may, on his own initiative, continue the prosecution through to conviction. Similarly, if a private prosecutor discontinues a case without the court's permission, another person may be allowed by the court to proceed with it. See Glanville Williams, "The Power to Prosecute" [1955] *The Criminal Law Review*, p. 597–598.

[153] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 169; a new witness with contradictory evidence might suddenly be discovered, or the prosecutor, demonstrating a suitable appearance of insincerity might persuade the grand jury to dismiss the charge. See also Edwards, *Law Officers of the Crown*, *supra* n. 39 at p. 339ff., concerning the problem of the abandonment and misuse of prosecutions for the purposes of "extorting money", p. 341 ibid.

The private prosecutor's rights extended beyond conviction. Following conviction, particularly in cases calling for the death penalty, the prosecutor could be very influential in determining whether the accused might be granted a pardon.[156] But he could not simply do as he pleased:

> Because his discretion was so wide, the private prosecutor's acts were constantly scrutinized and subjected to the ethical judgements of the community, and of the different classes of which it was composed. Because he might be made to change his course, the pressure could be very great.... The danger of anonymous malicious damage to property, particularly in rural parishes, undoubtedly subjected some prosecutors to strong pressure to drop charges, to reduce the charge between the preliminary inquiry and the grand jury hearing, or not to begin at all. Within the community itself, this greatly accentuated the pressure to reach accommodations outside the courts.[157]

Due to the political temper of the times, it was "almost inconceivable that the

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[154] In England, in the nineteenth century, a private prosecutor intending to have professional counsel at trial, would first engage a solicitor who took the instructions, gathered all the necessary information and materials and having prepared the "brief" would engage a barrister to prosecute the matter in court. The barristers were under a professional obligation to carry out their instructions or to return the brief. In one instance, a barrister, having followed instructions which he did not like, and being unhappy with the conviction he had just obtained, applied for a pardon on the prisoner's behalf. See Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 169–170.

[155] Ibid., p. 169.

[156] Ibid., p. 170.

[157] Idem.

Attorney General should act as the protector of the ordinary citizen from oppressive prosecutions."[158] The Attorney General and his agents quite literally knew nothing of the vast numbers of private prosecutions because there was no mechanism to bring that information to their attention.[159] The protection of the innocent rested primarily with the grand jury and with the justice of the peace at the preliminary inquiry. Thus in the nineteenth century, "just as prosecutions were in the hands of private citizens, the control of their abuse was also in their hands rather than in those of the government."[160]

There was also a practical constraint upon the private prosecutor's right to prosecute—namely, the cost of proceeding. In an indictable matter, the prosecutor was responsible for the costs of his counsel, any costs involved in appearing before the grand jury, the costs of issuing process, and the costs involved with the trial proceedings.[161] If the prosecution were successful, the prosecutor might, at the discretion of the court be awarded his expenses, payable by the defendant.[162] There were also statutory provisions for the payment of some prosecution costs, but these were never very generous. If the accused was acquitted, the prosecutor had to bear all his own costs as well as part or all of the defence costs, and if the prosecution was judged to be frivolous or malicious, the prosecutor also risked a civil suit being brought against him for damages.[163] It was because of the high costs and risks of prosecution that the prosecution associations of the late seventeenth and early eighteenth centuries were created.

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[158] Ibid., p. 172.

[159] Ibid., p. 171.

[160] Idem.

[161] Idem.

[162] But if the accused was indigent, such an award was of little value.

[163] See Cyril Phillips, (Chairman) *The Royal Commission On Criminal Procedure: The Investigation and Prosecution of Criminal Offences In England and Wales; The Law and Procedure*, (H.M.S.O. Cmnd. 8092–1), p. 61.

Prosecuting Societies

The rise in the level of crime consequent upon the rapid social and economic changes of the late eighteenth century coincided with the increasing inadequacy of the magistracy as a form of administrative control and the absence of a professional police force. The main responsibility for law enforcement "rested with the private citizen whose sense of duty must have been sadly dampened by the realization that the costs of bringing a criminal to justice had to be met out of his own pocket."[164] After 1752, legislation began to be enacted which made provision for the costs of prosecution but the amounts were not large and did not become more generous until well into the nineteenth century.[165] For the rich, the costs of prosecution were a small inconvenience; but they bore heavily upon the middle–class who had to resort to the services of prosecuting societies.[166] As for the poor, they rarely had their day in court other than from the prisoner's dock![167]

After 1750, the growth of private prosecution associations is discernible.[168] By 1839, there were more than 500 of these societies in operation and by 1850 they had "become extremely widespread numbering perhaps 1000 in the country as a whole."[169]

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[164] K.W. Lidstone and R. Hogg, *Royal Commission On Criminal Procedure: Prosecutions By Private Individuals And Non–Police Agencies*, Research Study No. 10 (H.M.S.O., 1980), p. 2, see also Edwards, *Law Officers of the Crown*, *supra* n. 39 at p. 338, who indicates that the private citizen had borne the responsibility and the costs of criminal prosecutions for many centuries.

[165] Lidstone and Hogg, ibid. p. 2 and see Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 172.

[166] See Hay, "The Criminal Prosecutor in England and its Historians", *supra* n. 4 at at p. 5. The prosecution societies could only have been created and operated on the strength of the individual's absolute right to bring a private prosecution. There is nothing in Hay's research to indicate that the prosecution's associations were in any way regulated or subject to regulation by the Crown.

[167] See Jay A. Sigler, "Public Prosecution In England and Wales"[1974] *The Criminal Law Review*, 642–651, p. 642.

[168] Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 170–171, Some of these societies were in existence as early as the late 1600's. Ibid.

[169] Ibid., p. 171, see also Lidstone and Hogg, *Prosecutions By Private Individuals And Non–Police Agencies*, *supra* n.164 at p. 2.

In a typical society, the members formed an association wherein they agreed to share expenses, pool all proceeds from convictions, offer rewards for information and determine which cases to prosecute through a committee elected for the purpose.[170] Occasionally the societies also organized security patrols, paid retainers to certain persons to watch for stolen goods, and sometimes agreed to take proceedings for individuals too poor to do it themselves.[171] Some of the busier and larger associations tried to pressure their members into surrendering their most significant discretion, "the right to forgive the offence entirely." [172] One Midlands association provided that if any member should settle, "forgive, or otherwise overlook any Felony or Felonies", they would be liable to a substantial fine.[173] Others promised to prosecute their members for compounding offences, still others threatened expulsion from the association for infractions of the rules.[174]

With the development and growth in numbers of the organized police forces after 1829 came the demise of the prosecuting associations. As the police began to take over the conduct and costs of criminal prosecutions, there was no longer any need for the private associations and they are not much in evidence after 1870.[175]

In retrospect, nineteenth century England can be seen as a critical period in the development of criminal prosecutions. The justice of the peace ceased to function as a public prosecutor. That task was taken up by private prosecution societies which sprang up and as quickly faded from view and were replaced by the police. The common thread which links all of these phases together is the private prosecution. While each of these agencies acted, or, as in the case of the police, would come to act in the capacity of a public prosecutor, they were never part of the office of the Attorney General or other department whose task it was to prosecute crime on behalf of the state. The British government had not set up a comprehensive state–financed public prosecutions system to replace the justices of the peace. There can be little wonder that by the 1880's, the police in England had begun to dominate criminal prosecutions. In theory, the police were regarded as agents of the private complainant. In law, once the police laid charges they become the prosecutors[176] and bore all the costs.[177]

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[170] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 172.

[171] Ibid. Although their members "constituted fewer than ten per cent of the adult male population, the societies accounted for as much as a quarter or more of the prosecutions." Ibid.

[172] Idem.

[173] Idem.

[174] Ibid., p. 172. These terms and provisions were not common because insistence on them would have reduced memberships in the associations. As well, because prosecutorial discretion was an entrenched right, was useful in bargaining between the victim and the accused, and was seen as part of the constitutional right of the prosecutor, it was not seriously challenged. Ibid., pp. 172–173.

[175] See Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 171–175 and Lidstone and Hogg, *Prosecutions By Private Individuals And Non-Police Agencies*, *supra* n.164 at p. 2.

The Police Become The Last Unofficial Public Prosecutors, 1829-1986

In 1829 the modern police were established in London.[178] That event signalled the beginning of the most comprehensive agency for prosecutions that England ever had, and constituted the system that would last for the next 150 years.

The reasons for many of the changes in the way prosecutions were handled after 1800 were due to the phenomenal increase of indictments.[179] Between 1815 and 1850, the English population increased by almost fifty per cent and there was a sevenfold increase in the number of indictments.[180] How much of the latter growth was due to an increase in crime and how much was due to an increased ability to prosecute is not clear;[181] but, the one thing of which there can be little doubt is that the increases greatly multiplied the work of the justices of the peace.[182] They could hardly continue to direct the investigation of crime as they had done in the previous century. So it was only natural, that once the new–style police departments were created,[183] their personnel took up the investigation process from the over–worked justices. Moreover as constables began to take complaints and investigate crimes, they also began to lay criminal charges on behalf of private complainants.

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[176] If the police initiated criminal proceedings, they were regarded in law as a private prosecutor with no greater authority than any other citizen. See *R. v. Metropolitan Police Commissioner, Ex Parte Blackburn* (1968) 1 All E.R. 763 (C.A.).

[177] See Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 174–175.

[178] Created by the authority of the London Metropolitan Police Act 10 Geo. IV, c. 44 (U.K.) 1829.

[179] Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 171–173.

Private Prosecutors Turn Blue

Historical research for the last half of the nineteenth century has not yet disentangled the roles played by private prosecutors and by the police prosecuting on behalf of private individuals, so it is not clear when the shift from a private prosecutions system to a police prosecutions system occurred.[184] However, "by 1879, the private prosecutor had begun slowly to turn blue. The police had become convenient substitutes for private prosecutors who would not, or could not, go to the trouble or expense of proceeding."[185]

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[180] Ibid., see also Hugh Willink, (Chairman) *The Royal Commission On The Police 1962: Final Report*, (H.M.S.O. Cmnd. 1728, 1962), pp. 11–13, 16,and 29.

[181] The effect of the prosecuting societies and the increased statutory allowances for costs which became more extensive and somewhat more generous after 1800, undoubtedly had their effect on the increased numbers of indictments. See generally, Hay, "Controlling the English Prosecutor", *supra* n. 97.

[182] See Kurland and Waters "Public Prosecutions in England 1854–79", *supra* n.135 at pp. 495–496 who indicate that by "the middle of the nineteenth century, the role of the magistrate had tended to shift from that of investigator.... and prosecutor to that of a judge at a preliminary criminal hearing".

[183] For a concise history of the office of constable and the "old style" police structure in England, see Willink, *The Royal Commission On The Police 1962: Final Report*, *supra* n.180 at pp. 10–18.

[184] Hay, "The Criminal Prosecutor in England and its Historians", *supra* n. 4 at p. 9.

[185] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 175.

London was the first English city to form a modern civil police force. It began operations in 1829, and other counties and districts in England soon followed suit.[186] However, "neither the Metropolitan Police Act of 1829, nor any of the statutes setting up provincial police forces made any mention of the prosecutorial role of the police."[187] Thus, when constables began to prosecute, they did so as private citizens, or as the agents of private citizens, but not with any special powers.[188] With time, the volume of their prosecutions increased, and as they did, the need for prosecuting societies diminished and these died out.[189]

The Chief Constable Becomes the Public Prosecutor

From their inception in England, operational control of a police force rested with the chief constable who determined policy in accordance with the needs of the local community.[190] After a time, it became one of the responsibilities of the chief constable to determine whether or not a suspect would be prosecuted for a criminal offence.[191]

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[186] There were 153 separate civil police forces in England by 1964, see George F. Cole and Andrew Saunders, "Criminal Prosecution in England: Evolution and Change" (1981–82) 14 *Connecticut Law Review*, 23–40, pp. 34–35.

[187] Lidstone and Hogg, *Prosecutions By Private Individuals And Non–Police Agencies*, *supra* n.164 at p. 2 and Willink, *The Royal Commission On The Police 1962: Final Report*, *supra* n.180 at pp. 11–18, see also Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 173, who indicates that while there were several objects in view when the Metropolitan police force was first established, it was never envisaged that it should become a prosecutorial agency, or that it would come to dominate the prosecution process. Yet within one hundred years of their formation, the English police were responsible for over 88% of prosecutions by indictment. Ibid.

[188] Lidstone and Hogg, *Prosecutions By Private Individuals And Non–Police Agencies*, *supra* n.164 at p. 2, and see Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at pp. 16–17, Edwards, *Law Officers of the Crown*, *supra* n. 39 at pp. 335–336, and Sir Norman Skelhorn *Public Prosecutor: The Memoirs of Sir Norman Skelhorn*, (London: Harrap, 1981), p. 65.

[189] Lidstone and Hogg, *Prosecutions By Private Individuals And Non–Police Agencies*, *supra* n.164 at p. 2, see also Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 172–177.

[190] Willink, *The Royal Commission On The Police 1962: Final Report*, *supra* n.180 at p. 15; Among other things, listed by the Royal Commission as one of the responsibilities of the police, rather than the Attorney General, was the duty of deciding "whether or not to prosecute persons suspected of criminal offences." Ibid., p. 22.

There is in England no statutory definition of the term "prosecutor" and it became customary to regard as the prosecutor the person named as the informant in the criminal proceeding.[192] As police prosecutions increased, it became the practice and later the general rule of procedure, to bring all police prosecutions in the name of the local chief constable.[193] At trial, another individual such as a constable or counsel hired for the case, would appear to prosecute the matter as agent for the chief constable.[194] In law, the prosecutor proceeding with the matter in court acted "on the instructions of the chief constable, and the same relationship existed between the prosecutor and the chief constable as between any litigant and the practitioner he has employed."[195] Therefore, unless the Attorney General had personally intervened or had himself initiated and conducted a prosecution, counsel appearing for the Crown in criminal charges laid by the police were not appearing as agents of the Attorney General but as counsel for the chief constable, and conducted the prosecution subject to his instructions.[196]

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[191] Ibid.

[192] Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 642.

[193] See Cole and Saunders, "Criminal Prosecution in England", *supra* n. 186 at p. 31.

[194] Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at p. 21.

[195] Cole and Saunders, "Criminal Prosecution in England", *supra* n. 186 at p. 31 and Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at p. 21.

[196] Herein lies the major difference between England and Alberta. In England, in law, the chief constable was in charge and control of all prosecutions brought by the police. He and only he could determine whether his force would lay a charge and if laid whether it would be proceeded with, and if proceeded with, whether it would be prosecuted as charged, reduced to a lesser offence, or withdrawn altogether. It was the chief constable, through his agents, who gave instructions to prosecuting counsel. While the Attorney General, and later the Director of Public Prosecutions, had the authority to intervene and take over a police prosecution, they never had authority to require the police to lay charges or to prosecute or not prosecute a particular matter. See *R. v. Metropolitan Police Commissioner, Ex Parte Blackburn* (1968) 1 All E.R. 763 (C.A.), see also Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at pp. 20–22 and Mollie Weatheritt and David R. Kaye, *Royal Commission On Criminal Procedure: The Prosecution System*, Research Studies No. 11 & 12 (H.M.S.O., 1980) p. 4. In Alberta the police investigate suspected crimes (con't)

From at least the turn of the century and until 1985, the local chief constables, through their agents acted as the unofficial public prosecutors in England on a scale far greater than the justices of the peace ever managed in their day.[197] This was because prosecuting justices had only filled the gaps in a system of private prosecutions, whereas after a time, the police replaced the private prosecutor almost entirely.[198]

The Prosecuting Solicitors Departments

When the police were prosecuting a matter which would be tried by jury in the Crown court, it was necessary to engage a solicitor who in turn briefed counsel to appear at trial.[199] At first, private solicitors were retained to prepare the briefs for trial counsel, but as the volume of cases grew it became practical for the police to employ solicitors on a full time salaried basis and in 1935, a solicitors department was created within Scotland Yard.[200]

Other urban police departments followed the lead of Scotland Yard while those in rural areas continued to hire counsel on a case–by–case basis. Of those forces which did have their own full time solicitors, the duties and discretion given to the solicitors varied with each department.

There was a varied relationship between the prosecuting solicitors and individual police officers, and their respective duties in the commencement and conduct of

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and lay criminal charges, but from that point, at least with respect to indictable matters under the Criminal Code, the Attorney General, through his agents, determines whether the prosecution will proceed and to what extent. See Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986), Chapter 12, see also Cyril Philips, (Chairman) *The Royal Commission On Criminal Procedure—Report*, (H.M.S.O. Cmnd. 8092, 1981), p. 136ff.

[197] See Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 173.

[198] See ibid., p. 173.

[199] See Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at p. 16.

[200] Ibid., p. 21.

prosecutions.[201] Perhaps the most succinct explanation of that relationship is provided by Friesen and Scott:

> In many ways, the prosecuting solicitor is simply the legal adviser to the police officer who wishes to invoke the criminal process; thus he takes instructions from his police officer client and does what he wants him to do by putting in train the necessary legal procedures, appearing in court.... and briefing counsel to appear in the Crown court in jury cases.[202]

The solicitor–client model is not an accurate description of the police–solicitor relationship because of the routine associations which were established between the constables and the prosecuting solicitors, and because of the different tasks and duties each carried out. In addition, structural and procedural matters might arise in the context of a particular case which were dealt with by the solicitors, often without reference to the officers concerned.[203] In practice, prosecuting solicitors had varying degrees of independence from the police depending upon the organization of the police force.[204] At one extreme, solicitors were only consulted in advance of charges being laid where the particular charge was serious; at the other was the formal process set up by one county whereby the prosecuting solicitor was consulted and made his recommendation concerning the charges in all indictable cases and in all serious summary cases in advance.[205] "Likewise, with plea bargaining, some [solicitors] reported their belief that they must consult the police before dropping charges, while others felt they could agree to the bargain without notifying the police of their action."[206]

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[201] E.C. Friesen and I.R. Scott, *English Criminal Justice*, (Birmingham, England: Institute of Judicial Administration University of Birmingham, England, 1976), p. 109.

[202] Idem.

[203] Ibid., p. 110.

[204] Cole and Saunders, "Criminal Prosecution in England", *supra* n. 186 at p. 36.

[205] Idem.

Until as recently as 1981–82, police officers in England conducted the majority of prosecutions. With greater than ninety–seven per cent of all criminal cases disposed of in magistrates courts, the police had been able to play their traditional role as prosecutors.[207] However, since 1970, police solicitors' departments have come to play a greater role in prosecutions, "and in some cities such as Birmingham and Manchester, policemen have been completely replaced in the courtroom by staff solicitors, or occasionally by private solicitors hired for a particular case."[208]

Until 1986, all police forces in England employed or had easy access to prosecuting solicitors. Although in theory prosecuting solicitors were merely legal advisers to the police and took their instructions from them, in practice they could exercise more control over prosecutions than the model would suggest.[209] The police almost always followed the advice they were given, and when consulted in advance, prosecuting solicitors could significantly affect the decision to prosecute.[210]

While the English system of bringing police prosecutions in the courts had changed over time, and even though the police increasingly used the services of prosecuting solicitors until 1985,[211] two things had never changed since the formation of the police force in 1829. The first was that, in theory a police officer prosecuting a crime had no greater authority than a private citizen.[212] The second was that because all prosecutions brought by the police were brought in the name of the chief constable, only the chief constable or his agents could decide and ultimately determine how a charge, once laid, would proceed.[213] That control by the chief constable ultimately meant that plea bargaining was held to a low level,[214] for the simple reason that the prosecuting solicitor, or the barrister, appearing for the Crown at trial, was obliged to turn to the client to obtain instructions.[215] In theory, the client was the chief constable, but in practice it was the investigating officers and they might be quite "uninterested in accepting the terms of the bargain."[216]

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[206] Ibid., at pp. 36–37 the authors describe a typical case from arrest to prosecution showing what the actual practice was, who exercised discretion and on what basis.

[207] Idem.

[208] Idem.

[209] Ian R. Scott, "Criminal Prosecutions In England and Wales" (1977–78) 3 *Justice System Journal*, 38–49, p. 45.

[210] Ibid. at p. 46. When a case was tried on indictment, there was a prosecution team; the police who collected the evidence and decided to bring the case, the prosecuting solicitor who prepared the brief and retained the barrister, selected from the independent Bar, that was to appear as the prosecution's advocate.

[211] When the Prosecution Of Offences Act 1985, (U.K) was passed. This Act and its effects are discussed below.

This lack of independence on the part of the legal counsel prosecuting the Crown's case in court was one of the major reasons that the police prosecutions' system was brought to an end with the passage of the Prosecution Of Offences Act 1985.[217] By that Act, the Director of Public Prosecutions was placed in charge of all police prosecutions and was for the first time, free to exercise independent judgement concerning the prosecution of charges laid by the police.[218]

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[212] See Devlin, *The Criminal Prosecution in England*, *supra* n. 37 at pp. 16–17.

[213] This of course was subject to the possibility of direct intervention of the Attorney General or the Director of Public Prosecutions, see generally Edwards, *Law Officers of the Crown*, *supra* n. 39.

[214] Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 648.

[215] Idem.

[216] Idem.

[217] The background leading up to the passage of the Prosecution Of Offences Act 1985, is discussed in the last part of the following section.

[218] The office of Director of Public Prosecutions was first established by legislation in 1879. Its history is discussed in the following section.

An Official Public Prosecutor For England - At Last

The Call for a Public Prosecutor

England never had an "official" public prosecutor until the last quarter of the nineteenth century. Although the office of Attorney General of England dates back to the thirteenth century, the incumbent never functioned in that role,[219] and "it was not until 1879 that a national public official was designated by law to have general supervisory responsibility for the prosecution of some serious crimes of a non–political nature."[220] The creation of this office came about because the system of private prosecutions, supplemented by police prosecutions between 1800 and 1875 was far from satisfactory.[221]

It has been suggested that the rapid population increase, urbanization and the momentous economic changes in England in the early 1800's, gave rise to class and social conflict which generated additional crime.[222] All this, coupled with the publication of crime statistics commencing in 1805, and the unusual interest Parliament was showing in the criminal law, gave crime a higher than normal profile in English life.[223] Under these circumstances, defects in the private prosecution system such as compounding of offences,[224] reliance on private initiative (which often failed to ensure serious or notorious cases were prosecuted), malicious prosecution of the innocent for reward money, blackmail or extortion, the inability of the grand jury to sift the wheat from the chaff,[225] and the greatly increased volume of criminal cases, became greatly magnified in the mind of the public, and hence generated intense debate. It thus became apparent to those in authority that some action was necessary to eliminate these defects. Their solution was the creation of the Director of Public Prosecutions.[226]

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[219] See Edwards, *Law Officers of the Crown*, *supra* n. 39 at pp. 1–90.

[220] Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 645.

[221] See Williams, "The Power to Prosecute", *supra* n.152 at p. 601.

[222] Hay, "Controlling the English Prosecutor", *supra* n. 97 at pp. 174–175.

[223] Idem.

[224] This refers to the illegal private settlement of prosecutions outside of the court. The accused would agree to return goods and/or pay a money settlement and the prosecutor agreed to drop the prosecution.

This was not a new idea, for "Bentham had advocated the appointment of public prosecutors as early as 1802, and this was strongly supported by the Criminal Law Commission in 1845, and by the sponsors of numerous Bills in Parliament from 1854 onwards, which had as their object the creation of a central public prosecutor's office with district agents."[227] Although these proposals had widespread support, they were opposed by the legal profession.[228] Moreover in Bentham's time and later the government was not interested because it thought the scheme too expensive.[229] Thus none of the proposals were accepted until 1879 when the public debate became intense and the reform movement generated overwhelming support. Even then the Director of Public Prosecutions functioned only on an advisory basis.[230]

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[225] Hay indicates some grand juries would have as many as 400 cases a week to determine, ibid.

[226] For a discussion of the background and history of the movement for a public prosecution's system in England prior to 1879, see Pendleton Howard, *Criminal Justice in England*, (New York: Macmillan Company, 1931) pp. 46–95; Edwards, *Law Officers of the Crown*, *supra* n. 39 Chapter 16; Joan Kennedy, *The Prosecutorial Power In Canada*, (unpublished LL.M. Thesis, University of Alberta, 1984) pp. 44–48; and Kurland and Waters "Public Prosecutions in England 1854–79", *supra* n.135.

[227] Williams, "The Power to Prosecute", *supra* n.152 at p. 601.

[228] Idem.

[229] Idem.

[230] See Howard, *Criminal Justice in England*, *supra*, n. 226, at p. 3.

The Prosecution of Offences Act 1879

Characteristically for the British, the solution reached in creating the Director of Public Prosecutions was a compromise between opposing forces. Although the office had been created, the Director was given only two staff members to carry out his duties, and these individuals were both administrative clerks.[231] As originally established, the Director conducted no prosecutions personally, but merely made recommendations to the Treasury Solicitor who arranged for the recommended prosecutions to be carried out.[232]

By the Prosecution of Offences Act 1879, the Director of Public Prosecutions, under the superintendence of the Attorney General, was authorized to institute, undertake and carry on criminal proceedings and to give such advice to chief police officers, justices' clerks and other persons involved in criminal proceedings, concerning the conduct of those proceedings as might be provided for by the regulations.[233] The Director could also exercise his powers whenever others had started proceedings and sought his assistance, or where there was reason to believe that criminal proceedings ought to be taken in a particular case.[234] He was also authorized to take action, "in cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director necessary to secure the due prosecution of an offender."[235]

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[231] Williams, "The Power to Prosecute", *supra* n.152 at p. 601; See also Edwards, *Law Officers of the Crown*, *supra* n. 39 at pp. 335–366 for a detailed history of events leading up to the creation of the Director of Public Prosecutions in 1879.

[232] Ibid., p. 602. See also Skelhorn, *Public Prosecutor*, *supra* n. 188 at p. 65, and Kurland and Waters "Public Prosecutions in England 1854–79", *supra* n.135 at p. 47. Barristers hired by the Treasury Solicitor, although they came to be called Treasury Counsel, were at all times independent barristers, and were never government employees.

[233] 42 & 43 Vict. c.22, s.2 (U.K.).

[234] Ibid., and see Friesen and Scott, *English Criminal Justice*, *supra* n. 197 at p. 111. The Director could prosecute in any serious or difficult case, or carry on a prosecution at the direction of the Attorney General, but otherwise did not take the initiative in seeking out cases to prosecute. See Williams, "The Power to Prosecute", *supra* n.152 at p. 602.

It is quite apparent that the British parliament never intended that the Director of Public Prosecutions should be a prosecuting official of the type used at the time in other jurisdictions such as Scotland or Canada.[236] The enacting legislation did not set up a national system of public prosecutions, nor did it provide for any local officials to conduct the prosecutions. As well, the government was not committed to taking "any except the most important criminal proceedings or those in which a public interest was involved."[237] As originally established, the Director of Public Prosecutions was intended to be a consultant on criminal legal matters and was to exercise a large measure of discretion in determining which matters the government would prosecute—tasks formerly undertaken by the Home Secretary and the Attorney General.[238]

Although the Director's office was set up in 1879, it was not until five years later, in 1884, that all chief constables were required to submit to the Director regular reports concerning indictable offences which had been committed in their police districts.[239] Thus, once the Director started receiving that information, one could properly speak of a national system of public prosecutions in England.[240] Since the Director had no investigative staff, he had to work closely with the police authorities.[241] Often when dealing with local police authorities concerning routine offences the Director would use as his agent the same prosecuting solicitor used by the police for the area concerned.[242] For cases which came before the Crown courts, the Director would brief independent barristers to conduct prosecutions for the Crown.[243]

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[235] Prosecution Of Offences Act, 1879, 42 & 43 Vict. c. 22 s. 2 (U.K.).

[236] See Howard, *Criminal Justice in England*, *supra*, n. 226, at p. 39. When the first Prosecution Of Offences Act was passed in 1879, both Canada and Scotland had public prosecutor models in place, neither of which were adapted for use by the British. See generally S.C. Silkin, "The Prosecution Process" (Spring 1984) *Public Law*, p. 6. This topic is dealt with in Chapter VI below.

[237] See Howard, *Criminal Justice in England*, *supra*, n. 226, at p. 39.

[238] Ibid. p. 79, see also Scott, "Criminal Prosecutions In England and Wales", *supra* n. 209 at pp. 46–47.

[239] Prosecution of Offence Act (1884), 47 & 48 Vict. c. 58 s. 3 (U.K.). Prior to enactment, the Director had no means of finding out what types of criminal prosecutions were being conducted across England.

[240] See Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 645.

Although the Director was given the task of supervising criminal prosecutions, he was given no powers of action or supervision over prosecutions being conducted by private prosecutors. The Prosecution Of Offences Act of 1879, which was not altered in this respect by the amendments made in 1884, specifically protected and continued the rights of private prosecutors.[244] In 1908 the office of Director of Public Prosecutions was established on a fresh basis.[245] Prior to that time the actual prosecutorial functions of the Director were in the hands of the Treasury Solicitor who conducted any prosecutions requested by the Director.[246] By the provisions of the new legislation all prosecutorial functions were placed entirely in the hands of the Director of Public Prosecutions. As well, the Director was given for the first time, authority over private prosecutions which allowed him to take over the prosecution and either continue or drop it, with no recourse open to the private prosecutor.[247]

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[241] Williams, "The Power to Prosecute", *supra* n.152 at p. 602. It should be noted that the Director also had authority to work through agents in matters for which he was responsible. See also Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 645.

[242] Idem. .

[243] Idem.

[244] Section 7 of the Prosecution Of Offences Act, 1879. The Prosecution Of Offences Act, 1884 amended the 1879 Act by combining the office of Director of Public Prosecutions with that of the Treasury Solicitor (s.2) and by requiring the Chief Constables to supply the Director with certain types of information concerning indictable offences (s.3). See also Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 179.

[245] This was actually the second re–organization. By the Prosecution of Offences Act (1884), the office of the Director of Public Prosecutions was combined with that of the Treasury Solicitor so one appointment performed both functions. In 1908, the offices were again separated and the Director's powers and duties somewhat expanded.

[246] Ibid., and see Williams, "The Power to Prosecute", *supra* n.152 at p. 602.

The Director of Public Prosecutions After 1908

Parliament, when it reorganized the office of the Director of Public Prosecutions in 1908[248] conferred unlimited discretionary powers upon the Director who was then "empowered to take over the control of any prosecution whether involving a summary or indictable offence, and irrespective of the person or authority at whose instigation the proceedings were originally instituted."[249] Although the Director had wide powers of supervision, he did not often take the initiative in seeking out prosecutions to conduct, [250] and rarely exercised his powers in relation to private prosecutions.[251]

Although the Director was appointed to his office by the Home Secretary,[252] and while his discretionary and supervisory powers did not originate with the Attorney General, he was nevertheless under the supervision of the Attorney General and had been ever since the office was first created.[253] This arrangement was seen to be necessary because the Attorney General was answerable to Parliament for the actions of the Director.[254]

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[247] Hay, "Controlling the English Prosecutor", *supra* n. 97 at p. 179, see the Prosecution Of Offences Act, (1908) 8 Edw. 7 c. 3, s. 2(2) (U.K.); While the director has a supervisory role over private prosecutions, in practice "it has been exercised on extremely few occasions." Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England*, *supra* n. 163 at p. 56.

[248] Prosecutions of Offences Act (1908), 8 Edw. 7 c. 3 (U.K.).

[249] Edwards, *Law Officers of the Crown*, *supra* n. 39 at p. 10 and see p. 397; see also The Prosecution of Offences Act, (1908) c. 3 s. 2(3).

[250] See Williams, "The Power to Prosecute", *supra* n.152 at p. 602.

[251] See Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England*, *supra* n. 163 at p. 56.

[252] Prosecution of Offences Act (1879) s. 2.

[253] Ibid., and see, Bernard M. Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", (1974) *Public Law*, pp. 60–61 and Edwards, *Law Officers of the Crown*, *supra* n. 39 at p. 364; The Attorney General has never taken any active supervisory role in the Director's office although there is communication on sensitive matters. See Edwards, ibid., pp. 367–401 for the modern development of the Director's office.

The growth and development of the Director's office since 1908 has been generally unremarkable. While it has its critics[255] the office developed relatively quietly alongside the system of police prosecutions and prosecuting solicitors. While there were some tensions between the Director's office and the prosecuting solicitors, these had mainly to do with administrative delays in the Director's office.[256]

To understand in detail the full range of duties and responsibilities of the Director of Public Prosecutions prior to 1986,[257] detailed reference would have to be made to the various Prosecutions of Offences Acts passed since 1879 and the regulations made pursuant to those Acts.[258] These provided for a range of criminal offences which the police were required to report to the Director so that control of a prosecution might be taken.[259] The list included all cases which by statute must be undertaken by the Director of Public Prosecutions,[260] any indictable case in which the prosecution was withdrawn entirely or not proceeded with promptly, and every case in which the chief of police sought advice, or required assistance.[261] While the Director was given supervisory jurisdiction over a wide range of statutes and offences, much of his time and that of his staff was "spent in reviewing the information reported to him by chief police officers in order to give his consent, where required by statute, or to consider intervention in a whole range of offences which the chief police officers must report to him."[262] Furthermore, the sheer volume of information reported to the Director and the screening and decision-making which must take place as a result, created "a severe limitation upon the ability of [his] office to conduct criminal prosecutions."[263]

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[254] Idem.

[255] See Scott, "Criminal Prosecutions In England and Wales", *supra* n. 209 at pp. 46–47.

[256] Idem.

[257] When the provisions of the Prosecutions of Offences Act 1985, (U.K.) came into effect, changing the previous system.

[258] See Friesen and Scott, *English Criminal Justice*, *supra* n. 197 at pp. 111–113 for a very succinct overview of the duties of the Director; Many of the offences for which the Director is responsible may be found in the Prosecution of Offences Regulations 1946 (S.R. & O. 1946 No. 1467), see also Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", *supra* n. 253 at pp. 50–73, and J.Ll.J. Edwards, "Conflicts and Controls in the Law Enforcement Fields", (1966–67) 9 *Criminal Law Quarterly*, p. 89.

[259] Idem.

[260] Until the abolition of the death penalty in England in 1966, it was the duty of the Director of Public Prosecutions to institute or undertake criminal proceedings in the case of any offence punishable by death. Ibid.

Thus, as a practical matter, England's Public Prosecutor was not effectively in charge of the country's criminal prosecutions. For the most part, the police continued to prosecute without any direction or supervision from the Director of Public Prosecutions except in the most serious or difficult cases.[264]

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[261] In Delmar Karlen's *Anglo American Criminal Justice*, (Oxford; Clarendon Press, 1967) at pp. 22–23, a very concise list of the powers and duties of the Director of Public Prosecutions is provided as follows;

> He is required to prosecute any case punishable by death, and any case where his participation is ordered by the Home Secretary. He may prosecute, if he sees fit to do so, any case referred to him by any other government department. He may also prosecute any case that appears to him to be of such importance or difficulty that his intervention seems necessary, having the power to step in and take a case over from any private or police prosecutor who started it. There is a substantial list of offences which the police are required to report to the Director, so that he can decide whether or not to undertake prosecution from the outset, including all offences that immediately affect the public interest, such as sedition, espionage, misconduct by public officials, counterfeiting, and most offences of an especially serious nature such as manslaughter, rape, and sexual offences against children. Finally, the Director may, on request, give advice on the conduct of a case to any private or official prosecutor, and he may authorize any of them to incur special costs—as for scientific evidence—to be paid out of public funds.

[262] Sigler, "Public Prosecution In England and Wales", *supra* n. 167 at p. 646.

[263] Ibid. For example, in 1960 there were 5301 applications to the Director resulting in the completion of 1,112 indictable and 1,608 non-indictable cases. In 1971, there were 12,621 applications and 1,325 indictable and 1,356 non-indictable cases completed. The number of cases had remained almost the same in spite of an increase of 238% in the number of applications. Ibid.

[264] For example, in 1960, of the 1,044,833 cases dealt with summarily in England, the Director prosecuted only 525 cases. Of the 30,591 cases tried on indictment, he prosecuted 1503 of them. See Edwards, *Law Officers of the Crown*, *supra* n. 39 at p. 336. In Phillips *Royal Commission: Investigation and Prosecution of Criminal Offences In England*, *supra* n. 163 at p. 57, it is reported that in 1978 17,738 applications were made to the Director to prosecute various matters of which he prosecuted 1,178 of them.

As for the private prosecutor, the constitutional right to prosecute was not altered by any of the Prosecution of Offences Acts passed since 1879. Indeed, writing in 1981 Sir Norman Skelhorn, himself a former Director of Public Prosecutions between 1964 and 1977, said;

> It has always been a firmly entrenched principle in our Constitution that in England and Wales a private individual shall be entitled to institute criminal proceedings, and that in this sense the enforcement of law and order shall be in the hands of the ordinary citizen, and even today there are, strictly speaking, no public prosecutions. It may be noted that the Prosecution of Offences Act under which I operated, expressly provides that nothing in it or in the earlier Acts shall preclude any person from instituting or carrying on any criminal proceedings, but the Director of Public Prosecutions may intervene and undertake at any stage the conduct of those proceedings.[265]

There is a final chapter in the development of the office of the Director of Public Prosecutions and that concerns the changes brought about by the Prosecution of Offences Act, 1985. Sir Norman Skelhorn's words, are today only partly true. While the individual's right to institute criminal proceedings remains unaltered, there are at last in England not only an effective and official public prosecutor but, more importantly, public prosecutions!

Fundamental Change — Independent Public Prosecutors

Prior to 1986 [266] the criminal prosecutions system of England was different from Canada's because in the former, in the vast majority of cases, the police not only carried out the investigation but were responsible for any resulting criminal prosecutions as well.[267]

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[265] Skelhorn, *Public Prosecutor, supra* n. 188 at pp. 65–66.

[266] The criminal justice system was significantly altered by the Prosecutions of Offences Act 1985, which was given Royal Assent on May 23, 1985. However, not all of its provisions came into effect on that date; many major changes did not come into force until April 1, 1986. See SI 1985/1849, 1956, 2010.

Each of the 43 police districts established by the Police Act, 1964,[268] constituted independent prosecutorial authorities and decisions to prosecute rested ultimately with the chief police officer concerned.[269] Within these separate jurisdictions there was no common approach to prosecutions' policy.[270] Any policy which might have developed should logically have originated with the police chiefs or the prosecuting solicitors. For several reasons policy was never developed by the solicitors. Some authorities did not have their own prosecuting solicitors on staff. In those which did, while some solicitors viewed their job as a career, others saw it as a stepping stone to something else and thus with them a unified prosecutions policy was not a priority.[271] There were different inertias at work amongst the chiefs of police who were in law, under no greater duty to carry out prosecutions in specific cases than any private citizen.[272] As there was no national system directing prosecutions policy, police chiefs had no reason to establish policy for anything other than the needs of their own particular district.[273]

The Director of Public Prosecutions in England was infrequently involved in local decisions to prosecute. Apart from the Director, there existed no independent body of Crown lawyers who first assessed the police investigation to determine whether a prosecution was warranted, and if it was, themselves conducted the prosecution in court.[274]

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[267] Weatheritt and Kaye, *The Prosecution System*, *supra* n.196 at p. 4.

[268] c. 48 (U.K.).

[269] Weatheritt and Kaye, *The Prosecution System*, *supra* n.196 at p. 4.

[270] Silkin, "The Prosecution Process", *supra* n. 236 at p. 8, The Rt. Hon. Sam Silkin Q.C. was himself Attorney General of England from 1974–1979.

[271] Idem.

[272] See, *R. v. Metropolitan Police Commissioner. Ex Parte Blackburn* (1968) 1 All E.R. 763 (C.A.).

[273] Weatheritt and Kaye, *The Prosecution System*, *supra* n.196 at p. 4.

Although in recent years police forces had come to rely more heavily on prosecuting solicitors departments, the underlying solicitor–client relationship remained.[275] Where required, prosecuting solicitors had no choice except to follow the instructions of the police, their clients.[276] Prior to the new procedures, if there was anything which characterized the criminal prosecution system in England it was the lack of procedure.[277]

In the 1970's doubts were frequently expressed about the fairness of the criminal investigation system in England and whether citizens were adequately protected from the abuses of authority.[278] As a result the Callaghan Government set up the Royal Commission on Criminal Procedure in 1978 under the chairmanship of Sir Cyril Phillips.[279]

Prior to the establishment of the Commission, it had been noted that acquittals in criminal prosecutions in Crown court seemed rather high and concern was expressed that many Crown prosecutions were ill–advised.[280] The Commission considered a number of research studies concerning acquittals in the Crown courts and found that the most common factor related to the reasons for acquittal was the failure of the prosecution to offer sufficient evidence.[281] While eighty per cent of the acquittals were due to factors beyond the prosecutor's control, such as the innocence of the accused, the Commission found that the remaining twenty per cent of acquittals should have been predicted in advance of trial.[282] The Commissioners then heard the opinions of counsel with prosecutorial experience. These maintained that the high acquittal rate was often due to evidentially weak cases being continued by the police officer in charge, despite, and occasionally "in the face of contrary advice from the lawyer conducting the prosecution."[283] In view of their findings, the Commissioners concluded that it was unsatisfactory that the person responsible for the decision to prosecute was also the person who had carried out or been involved with the police investigation.[284]

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[274] Idem.

[275] Andrew Saunders, "An Independent Crown Prosecution Service" [1986] *Criminal Law Review*, p. 16.

[276] Idem.

[277] See Silkin, "The Prosecution Process", *supra* n. 236 at p. 7.

[278] Ibid. Referred to hereafter as the Commission.

[279] Idem. The commission's report was published in 1981

[280] See Philips, *The Royal Commission On Criminal Procedure - Report*, *supra* n.196 at pp. 126–131.

[281] Ibid., p. 131.

In October 1983, a White Paper entitled *An Independent Prosecution Service for England and Wales* [285] was tabled in Westminister fulfilling the government's promise to provide a plan for the establishment of an independent prosecution service.[286]

In its Report the Phillips Commission had taken particular note of the grave concerns expressed by the Prosecuting Solicitor's Society—that the old system of police prosecutions put "at risk the very independence of the legal adviser, whose judgement can be freely set aside at his client's discretion."[287] Consequently, the basic principle relied upon by those advocating an independent prosecutions service and as reflected in the Commission's report,[288] was that the responsibility for prosecuting crime should be separate from the responsibility for investigating it. "The prosecutor should be independent of the police, and equally important, the police should be independent of the prosecutor."[289]

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[282] Idem.

[283] Ibid., p. 132.

[284] Idem.

[285] Cmnd. 9074.

[286] Silkin, "The Prosecution Process", *supra* n. 236 at p. 6.

[287] Ibid., p. 8.

[288] See Philips, *The Royal Commission On Criminal Procedure - Report, supra* n.196.

The final result of the Commission's Report and the Government's White Paper,[290] was the Prosecution Of Offences Act 1985, which introduced into England for the first time, an independent prosecutions service similar to the system in effect in Canadian jurisdictions since the 1850's.

The Prosecutions of Offences Act 1985

The Prosecutions of Offences Act 1985,[291] not only created an independent prosecutions service but it introduced other changes as well. Where the Director of Public Prosecutions had formerly been appointed by the Home Secretary, the Director was now to be appointed by the Attorney General and must report directly to him.[292] Moreover the Director, under the superintendence of the Attorney General, is responsible for the development and general administration of prosecutions policy for all of England and Wales.[293] The work and activities of the Crown Prosecutions Service[294] will be accountable to parliament through a system of annual reports which the Attorney General must table in the Commons.[295] But while the Attorney General will be accountable to parliament for the actions of the Director of Public Prosecutions, he will not be accountable for every decision taken by local prosecutors.[296] The new system will operate from local offices where day–to–day decisions will be made. This is in contrast to the previous arrangement in which the Director's office and staff were all centrally located in London.[297]

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[289] Silkin, "The Prosecution Process", *supra* n. 236 at p. 6.

[290] *An Independent Prosecution Service for England and Wales* Cmnd. 9074. The paper was presented to Parliament in October, 1983.

[291] c. 23 (U.K.).

[292] See the Prosecutions Of Offences Act 1985 c. 23 ss. 2(1), 3(1), and 9(1),(3).

[293] Ibid. ss. 1(1)(a), and 3(1) and (2), see also Graham Zellick, "Independent Prosecutors" (1984) *Public Law*, p. 346.

[294] The title given to the service by the Prosecutions Of Offences Act 1985 c. 23 s. 1.

[295] Ibid., s. 9(2).

Given the local offices and the greatly expanded responsibilities, the new service required a much larger staff. For that reason, provisions were made for the service to inherit the staff of the existing prosecuting solicitors' departments as well as some civilian staff from the police authorities.[298]

The Act was designed to create an integrated national prosecutions service headed by the Director of Public Prosecutions whose authority is decentralized. Each of the local area offices is headed by a Chief Crown Prosecutor who is assisted by Crown Prosecutors, all of whom must be solicitors or barristers.[299] Because the local offices are located near police and court facilities, distance and delay should no longer be problems. The independence of the prosecutors from the police now being "secured by statute and not remoteness."[300] In addition, it is expected that because of the network of local offices, the Director will be relieved of many routine cases, such as homicides, which do not raise any special or difficult points of law or policy.[301] Under the new scheme, every Crown Prosecutor will have all the powers of the Director as to the institution and conduct of proceedings and concerning the giving or withholding of consent for those prosecutions which require the Director's consent.[302] However, on occasion, the Crown Prosecutors may be required to exercise their powers in accordance with the directions given by the Director.[303]

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[296] See Zellick, "Independent Prosecutors", *supra* n. 293 at p. 347.

[297] Ibid., p. 346.

[298] Prosecutions Of Offences Act 1985 c. 23 ss. 11 and 12 (U.K.).

[299] Ibid., ss. 1(1)–(4). It is noteworthy that these sections of the Act eliminate prosecutions by police officers. All prosecutions commenced by the police must now be prosecuted by a Crown Prosecutor who must be a barrister or solicitor.

[300] Zellick, "Independent Prosecutors", *supra* n. 293 at p. 347 p. 346.

[301] Idem.

Police investigations will not be controlled or supervised by the Director of Public Prosecutions. The general jurisdiction of the Director, and therefore his staff, to assume control of a police prosecution, arises only after the police have instituted proceedings.[304]

By section 10(1),[305] the Director is specifically charged with the duty of creating a policy Code for the use of Crown Prosecutors. The Code is to give guidance on the general principles to be applied in determining whether proceedings for an offence should be started, and if instituted whether it should be continued.[306] In this respect Crown Prosecutors have been given a statutory power to discontinue proceedings commenced by the police in the magistrates' courts. Without such authority, they would have required the consent of the court each time they wished to withdraw proceedings.[307] In those cases where there is a choice as to which of several charges might be laid, or where there is a choice between which procedure, summary or indictable, to follow in court, guide–lines are to be set out in the Code.[308] As provisions and guide–lines are promulgated, they are to be included in the Director's annual report to the Attorney General and made public.[309]

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[302] Prosecutions Of Offences Act 1985 c. 23 ss. 1(b)(7) and 3. For the present it appears that counsel appearing for the Crown in the Crown courts on behalf of the Director of Public Prosecutions, will not be full time staff but in most cases will continue to be independent barristers selected from the private bar. See ibid., ss. 4, 5(1)(b) and 14.

[303] Idem.

[304] Ibid, ss. 3(2)(a)–(c).

[305] Idem.

[306] Ibid, s. 10(1).

[307] Ibid., s. 23. This section sets up a fairly elaborate procedure for giving notice and provides the accused with a right of review under certain circumstances. In England there is no statutory equivalent to the stay of proceedings available under the Canadian Criminal Code R.S.C. 1970 ss. 508, and 731.

[308] Idem.

Prior to the Prosecutions of Offences Act 1985, the powers of intervention in a criminal prosecution by the Attorney General or the Director of Public Prosecutions were severely limited by custom and statute.[310] In the Attorney General's case, his ability to control prosecutions' policy arose mainly from the statutory necessity to obtain his consent for certain types of offences.[311] The same was true of the Director of Public Prosecutions, who had the additional statutory power "to obtain reports from the police and to 'call in' prosecutions."[312] In practice, neither the Attorney General (because historically he never had) or the Director (who could not)[313] supervised police prosecutions. The result was that there had been little systematic attempt to achieve a "consistent national prosecution policy."[314] This has now been remedied by regulations which require reports from chief police officers for certain classes of offences in which the police have decided not to prosecute following a complaint or investigation.[315] Such information will allow the Director to monitor the overall prosecutions activity and the policies of the police authorities across England.[316] Hence a consistent prosecutions policy can be devised and adopted and in addition, there will be a clear line of accountability in the authority structure in carrying out that policy.[317]

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[309] Prosecution Of Offences Act 1985, c. 23 s. 10(3).

[310] See Silkin, "The Prosecution Process", *supra* n. 236 at p. 8.

[311] Idem.

[312] Ibid. .When faced with tens of thousands of police prosecutions across England the Director, with his small staff, could not meaningfully exercise his authority so as to be an effective safeguard. Ibid, p. 8.

[313] Idem.

[314] Silkin, "The Prosecution Process", *supra* n. 236 at p. 8.

[315] Prosecution Of Offences Act 1985 c. 23 s. 8.

[316] By s. 3(2)(b) of the Act, the Director has the authority to institute proceedings as the public prosecutor. Thus, for example, if the police in an area decided not to prosecute violations of the pornography laws, the Director could as a matter of policy direct that such prosecutions be undertaken by the police on his behalf.

[317] See Silkin, "The Prosecution Process", *supra* n. 236 at p. 10.

Although the Act has altered dramatically the authority of the police to prosecute, there has been no statutory change in the right of the private citizen to prosecute; that right being specifically preserved by section 6(1) of the Act.

Until very recently there has never been a regime of public prosecutions for crime in England. There were a series of different officials or organizations who sometimes played the part of a public prosecutor but these always acted within the tradition and context of private prosecutions for crime. The one official who could have conducted prosecutions on behalf of the public but who rarely did so was the Attorney General. In Canada there is generally a misconception of the role (both modern and historical) played by the English Attorney General in criminal prosecutions. His role and office will be the subject of our examination in the following chapter.

IV. THE MISUNDERSTOOD ROLE OF THE ATTORNEY GENERAL AS PUBLIC PROSECUTOR IN ENGLAND.

The Attorney General of England as chief Law Officer of the Monarch, is by tradition vested with all the rights and powers of the sovereign when prosecuting cases for the Crown.[1] Over the centuries, those rights and powers became part of the common law of England.[2] The extent and nature of that common law authority has particular relevance here, because by section 2(e) of the Department Of The Attorney General Act,[3] the Attorney General of Alberta is empowered to;

> ...exercise the powers and is charged with the duties attached to the office of the Attorney General of England by law or usage in so far as those powers and duties are applicable to Alberta.[4]

Historically the Attorney General of England was never a public prosecutor as that term is commonly understood in Canada.[5] It was only as a result of the statutorily imposed supervision of the Director of Public Prosecutions, that the Attorney General became involved with criminal prosecutions at all.[6]

Origins Of The Attorney General

The Attorney General is the successor of the medieval King's "*attornati* ". These officers were barristers who followed the King's cases in court at a time when a notion, still relevant today, developed that the King, as the "fountain of justice", was always present in his courts. The King was an exceptional litigant, in that he enjoyed certain prerogatives, and these were exercised by his *attornati*.[7]

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[1] See J.Ll.J. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), pp. 1–32.

[2] See ibid., chapters 12 and 13.

[3] D–13, R.S.A. 1980.

[4] Ibid., s. 2(e).

[5] See the definition of public prosecutor in Chapter I, *supra*.

[6] See Chapter III F: Fundamental Change Independent Prosecutors, *supra*.

In England in the middle ages there was a proliferation of courts both civil and criminal in which matters of great importance to the sovereign were being discussed and litigated, often in several forums at once.[8] "For the King to appear in person as plaintiff or defendant in such suits was inconceivable."[9] However, the courts had repeatedly expressed their willingness to "recognize the right of any person to come forward in court, and to sue on behalf of the King," no matter how humble their origin.[10]

Rather than simply trusting his affairs to the hands of chance or good fortune, by 1250 A.D. the King had found it expedient to appoint "King's Attorneys" (*attornati regis*) in order to be personally represented before the various courts.[11]

During the period between 1280 and 1400, it was quite common for there to be several concurrent appointments of persons as Kings Attorneys each of whom had the responsibility of royal representation in specific courts such as King's Bench, the Court of the Exchequer, and Common Pleas.[12] Some appointments were made *ad hoc* to represent the King locally[13] and in the fourteenth century it was still possible for other attorneys, not having been specially retained for the purpose, to represent the sovereign's interests in court.[14] It was the practice, which later hardened into law, that all those appointed to appear for the monarch were appointed by a royal writ.[15]

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[7] J.A. Isaac and Virginia Davis, "Abuse of Process—Defence of Due Diligence" (1979–80) 22 *Criminal Law Quarterly*, 441–450, p. 443; Examples of the Monarch's special prerogatives which devolved upon the Attorney General because of his position as the legal representative of the sovereign included the right to enter a *nolle prosequi* in criminal proceedings, the authority to file an *ex officio* information directly with the trial court without having taken preliminary proceedings, and the right to insist on a trial at bar. Ibid. See also Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 154.

[8] Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986), p. 15.

[9] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 15.

[10] Idem.

[11] Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 15.

[12] William S. Holdsworth, "The Early History of the Attorney and Solicitor General", (1919) 13 *Illinois Law Review*, 602–618, p. 604.

As the office of the King's attorney developed, the several attorneys who had been given limited powers in certain areas of practice, were replaced by a single general attorney who was given very wide powers to exercise including the power to appoint deputies to assist with the work of office.[16]

In 1407,[17] for the first time, Henry IV gave a patent to Thomas Derham "to act for the King in the Common Bench 'and all our other courts'."[18] This practice of appointing a general attorney continued from the time of Derham's appointment and in 1461 the appointee for the first time was described as the King's Attorney General of England.[19] The process of consolidating the office of the King's Attorney General was completed by the end of the fifteenth century, and by the sixteenth century the King's attorney had become "the most important person in the legal department of the state and the chief representative of the [King] in the courts."[20]

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[13] Idem.

[14] G.O. Sayles *Select Cases In The Court of King's Bench Edward III*, (Vol. 76) (London: Seldon Society, 1957) p. xxxix.

[15] See Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at pp. 603–604, and see National Association of Attorneys General, *Report on the Office of the Attorney General*, (Feb., 1971) p. 12.

[16] Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at pp. 605–606.

[17] Stenning cites the year as being 1399 but provides no authority for that time, see Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 16. Holdsworth says the patent was made on July 13th, 9 Henry IV. See Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at p. 605.

[18] Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at p. 605.

[19] Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 16; Also in 1461, and for the first time, an officer called the King's Solicitor was appointed who was the "original precursor of the modern office of Solicitor General." Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 28. By 1515, the King's Solicitor came to be called by the title Solicitor–General and in a little more than 150 years after that, the Solicitor General had become recognized as the senior deputy of the Attorney General. Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 16. See generally Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 28ff, for a general history of the development of the Solicitor–General's office.

Political Involvement

It was during the Tudor period that the King's attorney became chief law officer of the Crown and the individual who was consulted by the departments of state concerning legal matters. It was also the kings attorney "who prepared and conducted the important state trials."[21] As early as the reign of Henry VIII the Attorney General had "become an indispensable [functionary] in the House of Lords itself, "[22] for it was he who took the bills from the Lords to the commons and in doing so, "amend[ed] them and put…them into more workable shape."[23] As a result of that practice, much of the legislation of the time was the work of such outstanding jurists as Edward Coke and Francis Bacon.[24]

As the Attorney General's political involvement increased, particularly concerning his legislative tasks, pressures mounted for him to occupy a seat in the House of Commons.[25] The first incumbent to do so was Sir William Hobart in 1606, who was already a member of the Commons when he was appointed Attorney General.[26] After Hobart's appointment, there followed a fifty year period when Attorneys General were barred from holding a seat in the Commons.[27] Parliament changed that rule in 1673 when it allowed Sir Francis North, who had been appointed Attorney General, to sit as a member of the Commons as a right of office.[28]

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[20] Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at p. 606.

[21] National Association of Attorneys General, *Report*, (Feb., 1971) *supra*, n. 15 at p. 13.

[22] George W. Keeton, "The Office of the Attorney General" (1946) 58 *Juridicial Review*, 107–231 p. 109.

[23] Idem.

[24] Ibid., see also Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 32–38 for an account of the development of the Attorney General's role in the House of Lords.

[25] Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at pp. 609–610.

[26] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 36.

It was over the next twenty years, particularly during the great constitutional and parliamentary struggles following the Glorious Revolution of 1688–89 that "the Attorney general emerged as the legal adviser for the government and not just as the single servant of the King.[29] During that period, he not only represented the King in the Courts, but also provided legal counsel to all of the government's departments and represented them in court as well.[30] In the process he had been transformed into "an adviser for the government as a whole: the Attorney General for the Crown,"[31] and by the nineteenth century, was firmly established by custom and law as England's senior Law Officer of the Crown.

Historically The Attorney General Was Not A Public Prosecutor

The control of the incumbent Attorney General of England over criminal proceedings is founded upon both common law and statute, but his function in this respect must be "understood against the background of the common law's traditional reliance on the private prosecutor."[32] Until 1985, all British subjects including the police,[33] when acting as private prosecutors, could by right invoke the criminal process of the courts and the Attorney General had no authority to interfere in the assertion of that right.[34]

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[27] Holdsworth, "The Early History of the Attorney and Solicitor General", *supra*, n. 12 at pp. 609–611, see also Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 36–39. Dr. Brown of the University of Alberta History Department has informed the writer that in the first half of the seventeenth century, the Attorney General was looked upon as a "Kingsman"—one of the oppressors of the House of Commons. For that reason he was barred. After the monarchy had been restored, his seat in the House of Commons was re-established.

[28] Idem.

[29] National Association of Attorneys General, *Criminal Law Powers of State Attorneys General*, (Jan., 1975) p. 10.

[30] Idem.

[31] Idem.

On the other hand, no individual could claim the right to represent the public: "it can be properly said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney General…And just as the Attorney General has in general no power to interfere with the assertion of private rights no private person has the right…[to assert] public rights."[35]

To understand the interplay between the Attorney General's role to supervise the exercise of private rights and to control absolutely the assertion of public rights in the field of criminal law and prosecutions, it will be useful to briefly review some of the more important developments in criminal law powers and prerogatives of the office of the Attorney General.[36]

As previously outlined, historically there is no statutory basis for the office of the Attorney General[37] and his office has emanated;

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[32] See F.M. Brookfield, "The Attorney General" (1978) *New Zealand Law Journal*, 334–344, and see Chapter III *supra*, "The Transition Period 1750–1875".

[33] The passage of the Prosecution Of Offences Act 1985 c. 23 (U.K.) significantly changed the authority of the police to use their private right of prosecution.

[34] Although the Attorney General could take steps after the private prosecutor had initiated proceedings, he could not interfere with the common law right of the individual to take proceedings. This matter will be discussed in further detail, infra. See also National Association of Attorneys General *Criminal Law Powers of State Attorneys General*, (Jan., 1975) p. 8.

[35] From the speech of Lord Wilberforce in *Gouriet* v. *Union of Post Office Workers* (1977) 3 All E.R. 70 80 (H.L.), see also Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 286ff.

[36] This subject is covered exhaustively in Edwards, *Law Officers of the Crown*, *supra* n. 1. Professor Edwards is the leading authority on this subject and has written extensively concerning it.

[37] This is also true of the Solicitor General, who together with the Attorney General comprise the two senior Law Officers of the Crown. See Keeton, "The Office of the Attorney General" *supra*, n. 22 at p. 217 and E.C. Friesen and I.R. Scott, *English Criminal Justice*, (Birmingham, England: Institute of Judicial Administration University of Birmingham, England, 1976) p. 7.

> from the magnitude of the royal business in the courts....Little by little the Law Officers are drawn into the great constitutional struggles of Tudor and Stuart times, and when these are at last ended, the Law Officers emerge, firmly attached to the King's Cabinet Council.[38]

One of the most powerful of these was the Attorney General, and we first read of him in action in the pages of the *State Trials*.[39]

While the Attorney General is seen to prosecute regularly in state trials,[40] that example will be very misleading if it is thought that the Attorney General or his staff regularly prosecuted routine criminal offences.[41]

The prominence given to state trials in legal literature has oriented us to associate daily prosecution duties with the office of the Attorney General. In fact, the Attorney General had very little to do with ordinary criminal proceedings because, in a regime of private prosecution for crime he had no specific mandate to do anything in respect of them.[42] State trials were political trials for offences which were perceived to be dangerous to the state or the interests of the Crown. They were not representative of either the criminal procedure of the day, or the method by which ordinary criminal indictments were prosecuted.[43] In the routine felony trials of the same period counsel for the prosecution were not used and the Crown was not represented by anyone other than the private prosecutor.[44]

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[38] Keeton, "The Office of the Attorney General" *supra*, n. 22 at p. 217.

[39] See generally T. B. Howell, *Compleat Collection of State-Tryals, and Proceedings For High Treason and Other Crimes and Misdemeanors From The Earliest Period*, (London: 1809–1826) (33 Vols.).

[40] Idem.

[41] See John H. Langbein, "The Origins of Public Prosecution at Common Law", (1973) 17 *American Journal of Legal History*, pp. 315–316.

[42] See John H. Langbein, *Prosecuting Crime in the Renaissance*, (Cambridge, Mass.: Harvard University Press, 1974) p. 39.

[43] See Langbein, "The Origins of Public Prosecution at Common Law" *supra* n. 41 at pp. 315–316.

Although the very occasional appearance of lawyers for the prosecution are noticed in ordinary criminal trials for felony prior to 1750, they do not appear with any regularity until after that time, and their appearance does not become usual until well into the nineteenth century.[45] The barristers who do appear as counsel briefed for the prosecution in these early trials, are not agents of the Attorney General, but are the legal representatives of their client—the private prosecutor.[46]

Indeed, the Attorney General's involvement in routine criminal prosecutions and the administration of criminal justice at this time was practically non–existent.[47] The reason for this has to do with the fact that in the eighteenth century the extant prerogative powers of the Attorney General—*nolle prosequi* and the *ex officio* information—were the target of strong parliamentary attack.[48] This was mounted by the many members who had suffered as a result of "executive tyranny under the Commonwealth or the Stuarts, and the memory was still sharp."[49]

Hence given the social and political atmosphere of the times:

> It was almost inconceivable that the Attorney General should act as the protector of the ordinary citizen from oppressive prosecutions and there was no administrative machinery to provide [him with] that information. The *nolle prosequi* was a practical nullity in day–to–day prosecutions. The protection of

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[44] Idem.

[45] Ibid., p. 263ff.

[46] Idem, and see Chapter III section C, The Transition Period 1750–1875, *supra*.

[47] Douglas. Hay, "Controlling the English Prosecutor" (1983) 21 *Osgoode Hall Law Journal* .pp. 170–172.

[48] Ibid. The *nolle prosequi* power was similar to the modern stay of proceedings and the *ex officio* information was an information which the Attorney General could prefer directly before the trial court without the intervention of a grand jury. The nature and extent of these prerogative powers are discussed below.

[49] Ibid., p. 272.

the innocent was instead confided in the main to the grand jury.[50]

Who then shouldered the responsibility for supervision of the enforcement of the criminal law and the administration of justice between the sixteenth and the nineteenth centuries? There were in fact a series of groups such that "aside from the executive's continuous policy of investigation and prosecuting certain serious crimes against the state, such as treason and sedition, under the direct control of the Law Officers of the Crown, at the local level, a pattern of successive groups of 'officials' first assuming and later absolving themselves of responsibility can be seen over the centuries."[51]

These groups of officials included the grand jury which was eventually succeeded by the justices of the peace, who became, for hundreds of years, the workhorses of the English legal system.[52] After 1750, the justices were replaced by the private prosecutor and reward seekers, the latter of whom were primarily interested in winning the statutory rewards.[53] One hundred years later, those were in turn replaced by the police who came to bear the primary responsibility for both law enforcement and the prosecution of criminal offences.[54]

In the latter part of the nineteenth century, Parliament broadened the powers of the Attorney General so that he became watch–dog over private and public prosecutions in those areas which parliament believed to be politically sensitive.[55]

It was the Attorney General's prerogative powers, particularly his ability, using the

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[50] Idem.

[51] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 337, see also Chapter III, *supra*.

[52] Ibid., p. 338.

[53] Idem.

[54] Ibid., Edwards states that, "there was in England, prior to 1829, no organized body to investigate crime and prosecute offenders. Ibid.

[55] See Bernard M. Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", (1974) *Public Law*, p. 57.

nolle prosequi, to stay criminal proceeding which had been improperly brought, that made him the first choice of Parliament to become guardian of the criminal process.[56] In the second half of the nineteenth century, parliament began adding statutorily to the prerogative powers of the Attorney General by requiring private prosecutors to obtain his consent before certain types of criminal proceedings could be commenced.

Through that simple expedient, Parliament authorized and provided a means whereby the Attorney General could stop ill–conceived private prosecutions by declining to give his consent to their commencement.[57]

Further supervisory authority was given to the Attorney General, when the office of the Director of Public Prosecutions was first established in 1879. By the terms of the enacting legislation the Director was to be under the supervision of the Attorney General.[58] As the Attorney General was already cast in the role of guardian of the public interest respecting civil matters,[59] it was both appropriate and natural for him, under the scrutiny of parliament, to supervise the public's interest in criminal proceedings as well.[60] Thus, by the end of the nineteenth century, the Attorney General was cast in a very different role from that in which he was as the King's attorney in the fifteenth century.

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[56] Ibid., pp. 51–53. The Attorney General's *nolle prosequi* power is discussed below.

[57] Ibid,. Such prosecutions had become a serious problem in the last half of the nineteenth century. See also Patrick Devlin, *The Criminal Prosecution in England*, (London: Oxford University Press, 1960), pp. 17–18.

[58] Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", *supra* n. 55 at p. 57. The Attorney General is accountable to parliament for both his decisions, and for the actions of the Director of Public Prosecutions, see also Chapter III, "An Official Public Prosecutor For England—At Last" *supra*.

[59] See Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 286–295 for a review of the Attorney's *parens patriae* prerogative and his involvement in, and control over relator actions. See also W. Blackstone, *Commentaries on the Laws of England*, (A Facsimile of the First Edition 1765–1769) (4 Vols.) (Chicago: University of Chicago Press, 1979) (Vol IV), pp. 304–305 for Blackstone's comments on the law concerning relator suits.

[60] Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", *supra*, n. 55 at pp. 51–53.

A catalogue of the common law powers pertaining to the office of Attorney General demonstrated that he had "over–all authority for the initiation of criminal proceedings...[he was] empowered to terminate any case tried on a bill of indictment by entering a *nolle prosequi,*...[and he might] lay *ex officio* criminal informations that were triable outside the normal process of jury trial."[61] His common law authority has remained unchanged and most significantly in modern times, he may "control the prosecution of cases under a proliferation of statutory provisions that restrict criminal proceedings to those cases in which the consent of one or other of the Law Officers has first been given."[62]

It will be remembered that in England, criminal offences were ordinarily brought to trial through private prosecutions, and therefore historically, the role of the Attorney General on behalf of the Crown "was substantially confined to direct intervention only in those matters in which the sovereign had a particular interest."[63]

Before proceeding further with the discussion of the Attorney General's political and legal responsibilities after 1900, it will be useful at this juncture to consider briefly the Attorney General's common law prerogative powers as these existed up to the end of the nineteenth century.

The Ex–Officio Information

Prior to *Magna Carta*,[64] the King could, by the simple device of "informing" his own Council (the *curia regis*) that an offence was suspected, place a person on trial for his life, by the Council, for the alleged offence.[65] The "information" could be given directly by the King or placed before Council by one of his ministers or law officers.[66] Through this device, the King avoided the requirement of first having the allegations placed before the precursor of the grand jury for presentment or, as it was coming to be known, indictment.[67]

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[61] Edwards, *Law Officers of the Crown, supra* n. 1 at p. 7.

[62] Idem.

[63] Stenning, *Appearing for the Crown, supra* n. 8 at p. 17.

[64] 17 John (1215) (U.K.).

This method of procedure by the monarch did not sit well with the lords and barons of the time who were most likely to fall prey to it. Thus, one of the concessions wrung from King John at Runnymede was a due–process clause declaring "no freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed nor will we go upon him nor will we send upon him except by the lawful judgement of his peers of/and by the law of the land."[68] This established a principle of great constitutional importance because it meant that the King or his ministers could no longer, by "their own motion put a man on trial for felony."[69] The legal theory which came to be adopted in support of this provision was that because the King, unlike the incipient grand jury "had no personal knowledge of his subjects' affairs, he had no ground for proceeding against the subject without [an indictment found by a presenting jury]."[70] Thus, in the years following *Magna Carta* and its various re–enactments,[71] it could be said that where matters of life and limb were concerned, there existed between Crown and subject a shield born by his neighbours;

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[65] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 263ff.

[66] Idem.

[67] Idem.

[68] *Magna Carta* (1215), c. 39; (1225), c. 29, the English translation is taken from William S. Holdsworth, *A History of English Law*, (Vol I) (7th ed.) (London: Sweet and Maxwell, 1969), p. 59.

[69] J.H. Baker, "Criminal Courts and Procedure at Common Law", in J. S. Cockburn (ed.) *Crime in England 1550–1800* (London: Methuen & Co. Ltd., 1977) 14–48 at p. 18.

[70] Idem.

[71] See Theodore Plucknett, *A Concise History of the Common Law*, (London: Butterworth's, 1956), p. 22–26ff.

namely the grand and trial juries.[72]

While the King's right to lay a criminal information in felony cases, which were capital offences, was abolished after *Magna Carta*, the criminal information was not abolished altogether. He could still lay an information directly before the trial court where a misdemeanour was alleged which while tried by indictment, was not punishable by death.[73] The document commencing this special procedure came to be called an *ex officio* information. The right to file an *ex officio* information, thereby by–passing the grand jury and proceeding directly to trial, was personal to the monarch, and was a prerogative which the Attorney General as agent could exercise only in matters directly affecting the person of the sovereign.[74]

Writing between 1765 and 1769, Blackstone says of the *ex–officio* information;

> The objects of the King's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemeanours, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal...There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the King's attorney general,...in the court of King's Bench is as ancient as the common law itself. For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a

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[72] Baker, "Criminal Courts and Procedure at Common Law", *supra*, n. 69 at p. 19.

[73] See Stenning, *Appearing for the Crown*, *supra* n. 8 at pp. 17–18.

[74] See Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 262–267; "As indictments and informations, granted by the King's Bench are the King's suits, and under his control [as nominal prosecutor]; [*ex officio*] informations filed by his Attorney General, are most emphatically his suits, because they are the immediate emanations of his will and pleasure. They are no more the suits of the Attorney General than indictments are the suits of the grand jury." See the judgement of Chief Justice Wilmot in *Wilkes* v. *The King* (1768) 97 E.R. 123 125.

> criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanour, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of King's Bench by a suggestion on record, and to carry on the prosecution in his majestey's name. But these informations... are confined by the constitutional law to mere misdemeanours only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it.[75]

Two items stand out concerning the law of *ex officio* informations as expounded by Blackstone. The first is that they were intended for "enormous misdemeanours", so dangerous that a moments delay in their punishment or prevention could be fatal.[76] The second was that the probable effect of the misdemeanour was to endanger the monarch personally or his government.

In the first edition of *The Laws Of England*,[77] Lord Halsbury cites the above quoted passage from Blackstone[78] as being a correct statement of the law [79]and indicates that the last use of the *ex officio* information was said to be in 1887.[80] Halsbury cites a lengthy list of judicial decisions concerning the *ex officio* information, many of which are drawn from *State Trials* [81] and all of which appear to concern the Sovereign, the government or the public at large (inciting riots, disobeying quarantine orders and the like.)[82]

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[75] Blackstone, *Commentaries on the Laws of England*, *supra*, n. 59 at pp. 304–305.

[76] Presumably by "enormous misdemeanour" Blackstone intended to distinguish them from routine matters which did not involve significant state or Crown interests.

[77] Lord Halsbury, *The Laws of England*, (Vol IX) (1st ed.) (London: Butterworth, 1909), p. 329, footnote (v).

[78] Blackstone, *Commentaries on the Laws of England*, (Vol IV) *supra*, n. 59 at pp. 304–305.

[79] Halsbury *The Laws of England*, *supra* n.77 at p. 329 footnote (v).

[80] Ibid., p. 330.

[81] Howell, *State–Tryals*, *supra* n. 39.

The Nolle Prosequi

The origin of the *nolle prosequi* power may now be lost to us although its rationale was obvious, in that "it was natural for the Crown, in whose name criminal proceedings were instituted, to reserve the right to terminate the same proceedings at will."[83]

The modern basis for the Attorney General's authority to bring to an end criminal proceedings commenced by private prosecution, is stated by Crompton J. in *R. v. Allen*;[84]

> In this country where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether is is proper to proceed further in a prosecution. That power is vested by the constitution in the Attorney General and not in this Court.[85]

The procedure followed by the Attorney General to stop a private prosecution once started was to have formally entered on the record of proceedings his order called a *nolle*

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[82] Halsbury *The Laws of England*, *supra* n.77 at p. 329, footnote (v). It may be that the authority of the Attorney General of Alberta to file an *ex officio* information still exists in theory; see Section 506(2) of the *Canadian Criminal Code* R.S.C. 1970 c. C–34 which seems to abolish the use of the criminal information, but not the *ex officio* information. The point may be moot in view of s. 507(c) of the *Code* which provides for the preferring of a direct indictment by the Attorney General, where no preliminary inquiry has been held. A strong argument can be made that this section does not simply codify the Attorney General's common law power because it is much broader in scope. Section 507(c) provides for trial by indictment of offences which are not misdemeanours or their modern day equivalent, and it is not restricted to matters which affect the monarch, the government or the general public at large, parameters which were required before the *nolle prosequi* could be used.

[83] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 227.

[84] (1862) 121 E.R. 929 at p. 931.

[85] Idem.

prosequi.[86] The precise effect of the *nolle prosequi* once entered remains unclear.[87] What is clear however, is that having entered a *nolle prosequi* the prosecution is at an end and the decision as to whether proceedings should again be commenced, lies exclusively with the Attorney General and not with the private prosecutor or the courts.[88] Like the *ex officio* information, the *nolle prosequi* power was held only to be exercisable by the Attorney General personally, although it could be communicated to the court by someone acting on his directions.[89] If the Attorney General was wrong in the decision he took he was held to be answerable to Parliament.[90]

In practice, the *nolle prosequi* power was used sparingly. When it was resorted to it was usually to prevent some form of oppression such as the continuation of a prosecution against an accused who was seriously ill, or to protect a Crown witness who, having been promised immunity in return for co-operation and information, was nevertheless being prosecuted, or for similar circumstances.[91]

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[86] Translated this means, "I am unwilling that it should be prosecuted." Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 26.

[87] Ibid., pp. 26–27. The uncertainty concerns the issue of revival of the prosecution at some latter date. It is not clear whether a fresh indictment is required or whether the old one may be revived.

[88] Ibid., and see the judgement of Cockburn C.J. in *R.* v. *Allen* (1862) 121 E.R. 929, 931.

[89] *R.* v. *Dunn* (1843) 174 E.R. 1009, 1010 and see Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 27.

[90] *R.* v. *Allen*, p. 931. By tradition the Attorney General may be asked by Parliament only to account for his actions *ex post facto*, and it is for the Attorney General to decide how much of his reasoning to disclose. Cyril Phillips, (Chairman) *The Royal Commission On Criminal Procedure: The Investigation and Prosecution of Criminal Offences In England and Wales; The Law and Procedure*, (H.M.S.O. Cmnd. 8092–1) p. 59. However, not only is the Attorney General answerable to Parliament for the exercise of his *nolle prosequi* power, but he is, "probably now subject to judicial review if not acting for reasons of state.", Alec Samuels, "Non–Crown Prosecutions: Prosecution By Non–Police Agencies and By Private Individuals" (1986) *Criminal Law Review*, 33 p. 41. The *nolle prosequi* power has been codified by s. 508 of the *Criminal Code of Canada* R.S.C. 1970, c. C–34 as amended.

[91] Samuels, "Non–Crown Prosecutions" *supra* n. 90 at p. 41.

The Right of Reply

Edwards indicates that a further prerogative of the Attorney General was the right to have the last word to the jury in any case in which the Attorney General personally prosecuted.[92] This became known as the right of reply. In England, in an ordinary criminal trial, if the accused called no evidence in his defence, the prosecutor was required to sum up to the jury first, followed by the accused; if the accused called evidence, the order was reversed.[93] However, it became the prerogative of the Attorney General who was regarded as prosecuting on behalf of the country, in what amounted to a state prosecution, to have the right of reply—or last word to the jury, whether or not the accused had called evidence in his defence.[94]

These three powers, the *ex officio* information, the *nolle prosequi* and the right of reply, were the principal common law powers of the Attorney General of England in relation to criminal prosecutions. All of these were well recognized by the third quarter of the nineteenth century when the procedures of British common law as well as portions of its statute law[95] were formally being introduced into Manitoba and the North–West

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[92] Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 269ff, see also Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 23.

[93] Idem.

[94] See Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 271ff, *and R.* v. *Wood and Others* (1887) 88 C.C.C. Sess. Pap. 204, as quoted in Edwards (ibid), and Stenning, *Appearing for the Crown*, *supra* n. 8 at p. 24). Edwards notes that the right of reply had always been restricted to the Law Officers personally, although there was a brief attempt in the mid–nineteenth century to extend the rule to counsel briefed by the Attorney general. That initiative was ended with finality in 1884 when the Queen's Bench judges passed a resolution restricting the right to the Attorney General when personally prosecuting. As to the position in Canada, the state of the law is unclear; see Stenning, *Appearing for the Crown*, *supra* n. 8 at pp. 226–227, who suggests that an argument can be made for the current existence of the common law privilege, but restricted to the Attorney General personally. At one time the right of reply was part of the criminal law of Canada; see "An Act respecting Procedure in Criminal Cases, and other matters relating to the Criminal Law", 32 & 33 Vict. c. 29 s. 45(2) 1869 (Can).

[95] The law concerning criminal prosecutions in the North West Territories prior to 1905 is discussed in the following chapter.

Territories prior to Saskatchewan and Alberta becoming provinces.[96]

The State Prosecutor

In England at the turn of the century, the Attorney General was not normally a member of the cabinet or the privy Council so that he did not have any responsibility for the general policy positions of the government.[97] The history and tradition has been that the Attorney General has not been a political figure.[98] While he was responsible to Parliament for his decisions, any review by Parliament was by tradition exercised *ex post facto*.[99]

In a speech given to the House of Commons on February 16th, 1959, the then Prime Minister, Harold Macmillan explained why this was so, when he remarked that "it would be a very bad thing if the House of Commons or the Cabinet of the day tried to influence the semi–judicial functions of the law officers in the institution or the dropping of prosecutions."[100]

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[96] There were a number of other prerogatives which by tradition and common law devolved upon the Attorney General. These included his precedence as head of the English Bar, the accolade of knighthood, and the sole power to grant fiats for permission to appeal criminal matters to the Court of Appeal and the House of Lords. These matters are dealt with in Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 246–256, and 276–285. The Attorney General also had the right to insist on a trial at bar (the full court of King or Queen's Bench sitting at Westminister) and to select the venue. Venue was tied to the right of trial at bar since the full court only sat at Westminister. However the Attorney General also had the right to require his prosecutions to take place in any competent Assize court in any centre in England. See Edwards, *supra*, pp. 267ff.

[97] See Edwards, *Law Officers of the Crown*, *supra* n. 1 at pp. 158–176. While there have been a few instances of the Attorney General's membership in Cabinet and the Privy Council in the past, these are explained as being for reasons of political expediency. Ibid., see particularly pp. 171–176.

[98] Idem.

[99] See n. 90 *supra*. In *Ministerial Responsibility for National Security*, (Ottawa: Minister of Supply and Services Canada, 1980) by J. Ll. J. Edwards, he indicates (p. 45) that he has done further research on the question of the Attorney General's accountability to parliament since writing *Law Officers of the Crown* in 1964. He has found the precedent and tradition of the office unaltered and that recent examples confirm that "after the termination of the particular criminal proceedings, including the decision not to proceed with a criminal charge, the Attorney General is publicly accountable for the exercise of his discretionary powers. The extent to which [he] may feel disposed to inform the House of Commons of the grounds upon which he made his decision in individual cases, will vary according to the particular circumstances." Ibid.

In the same speech, Macmillan also said that:

> It is an established principle of government in this country and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure.[101]

The thrust of both remarks make it clear that the Attorney General is to be free from political interference when making decisions concerning prosecutions. That was the existing tradition in England.[102]

Macmillan's observations about the Attorney General have been widely circulated, particularly the last quoted excerpt which is contained in Professor Edward's now classic and widely read *Law Officers of the Crown.*[103] What is not widely known, at least by Canadian readers, is the hidden danger which lies in an uncritical acceptance of his comments. The problem arises if one assumes that the office and functions of the English Attorney General are similar to his Canadian counterpart. They are not.

In his speech, Macmillan took for granted three fundamental conditions of which his parliamentary audience would have been well aware. First, that routine criminal prosecutions were in law private prosecutions. Second, that the Attorney General very rarely instituted a prosecution or intervened in one. Finally, that the Attorney General, because of the various pieces of legislation which required his consent before certain types of prosecutions could be started, was called upon to make two initial decisions; first, whether the prosecution should be brought at all, and if it should, whether a private prosecutor should be allowed to prosecute on behalf of the public[104] or whether it would be a public prosecution brought by the government. Macmillan was most certainly not saying that in England it was the role of the Attorney General, through his staff, to decide in day to day criminal proceedings whether or not a subject should be prosecuted. Nor was he saying that this area of law should be one for public as opposed to private prosecutions which, while it is the practice in Canada, had never been the English tradition.[105] What Macmillan was saying was that in those few instances when the Attorney General was considering whether or not to commence a state prosecution, the Attorney should be free of all political interference in reaching a decision. That had always been the English tradition.[106]

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[100] H.C. Deb. Vol. 600, col. 33 as quoted in Dickens, "The Prosecuting Roles of the Attorney General and Director of Public Prosecutions", *supra*, n. 55 at p. 60.

[101] H.C. Deb. Vol 600, col. 31 (Feb 16th, 1959) as quoted in Edwards, *Law Officers of the Crown, supra* n. 1 at p. 177.

[102] Edwards, *Law Officers of the Crown, supra* n. 1 at p. 177ff.

[103] Ibid., The same excerpt from Prime Minister Macmillan's speech is quoted in Patrick Devlin, *The Criminal Prosecution in England*, (London: Oxford University Press, 1960) p. 20, also a very well known book, and more recently has been quoted again by Edwards in *Ministerial Responsibility for National Security, supra* n. 99 at p. 45.

The traditional function of the Attorney General was first of all as the Monarch's legal representative in matters directly affecting the sovereign. Over the years his responsibilities were increased to the point where he became the Crown's chief representative in all matters directly affecting the monarch and his or her government. The evidence is quite clear that historically and by tradition, the Attorney General of England did not prosecute and rarely intervened, in ordinary criminal prosecutions. He was not a member of cabinet and was not responsible for the overall administration of justice in England. In those cases in which he did prosecute, he did so because the interests of the Crown were directly affected. In so doing, he was not acting in the capacity of a public prosecutor, but rather in his capacity as the "State" prosecutor.

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[104] This was the very issue considered by the House of Lords in *Gouriet* v. *Union of Post Office Workers* (1977) 3 All E.R. 70.

[105] To compound the problem, Macmillan's speech was prompted because of controversy surrounding a decision of the Lord Advocate of Scotland. Edwards says that in his speech, Macmillan compared the Lord Advocate of Scotland to the Attorney General of England, but as will be demonstrated in the following chapter there is little similarity between the two offices. See Ibid., p. 177.

[106] It should be noted that by tradition and practice in England, it was not the Attorney General, but rather the Home Secretary who was considered to be the keeper of the interests of the state which arose outside "the actual administration of the law in individual cases before the courts.", Edwards, *Law Officers of the Crown*, *supra* n. 1 at p. 10. The "administration of the law in individual cases", referred to those few problem cases which arose which were the responsibility of the Attorney General. The Home Secretary had control of all the country's penal institutions and exercised indirect control over the nation's police forces, and was and is "responsible to Parliament for the general system of criminal law in the country." Ibid., p. 362, see also pp. 1, 10. See also Edwards, *Ministerial Responsibility for National Security*, *supra* n. 99 at pp. 41–64, for a discussion of the relationship between the Home Secretary and the Attorney General in England.

The above review comprises the salient history and tradition making up the "powers" and "duties" of the Attorney General of England which, through legislation, were passed on to the Attorney General of Canada who had jurisdiction in the North West Territories, and later, after it became a province, to the Attorney General of Alberta.

V. PROSECUTIONS FOR CRIME AND THE ADMINISTRATION OF JUSTICE IN THE PRE-CONFEDERATION PRAIRIE PROVINCES

In 1670, the Hudson's Bay Company was granted a Charter[1] by King Charles II giving them the sole trading and commercial rights in all of Rupert's Land.[2] This jurisdiction comprised much of what is now Manitoba, Saskatchewan, Alberta, and the present North West Territories.[3] In addition to the trading privileges the Charter provided, it also authorized the Governor in Council to make laws and ordinances not only for the purposes of the Company's business but also to judge "all persons belonging to the Governor and Company, or that shall live under them, in all cases whether civil or criminal, according to the laws of this kingdom and to execute justice accordingly."[4]

Thus, by the provisions of the Charter, a very basic judicial system was introduced into Western Canada, and the Hudson's Bay Company was made responsible for the administration of English justice throughout its trading empire.[5] The laws which were in force in Rupert's Land became those of 1670 England.[6]

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[1] Its full title was "The Royal Charter Incorporating The Hudson's Bay Company", the text of which may be found in E.H.Oliver, *Canadian Northwest: Its Early Development and Legislative Records*, 2 Vols. (Ottawa: King's Printer, 1915), pp. 135–153.

[2] See Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986), p. 51. See Horace Harvey, "The Early Administration of Justice In the North West" (1934) 1 *Alberta Law Quarterly*, pp. 171–172, for a descriptive definition of the lands and areas which were to comprise Rupert's Land, see also Archer Martin, "The Rise of Law in Rupert's Land".(1890) 1 *Western Law Times*, p.49ff. for a brief description of the events surrounding the granting of the Charter to the Hudson's Bay Company.

[3] Stenning, *Appearing for the Crown, supra* n. 2 at p. 51.

[4] See the provisions of the Charter in Oliver, *Canadian Northwest: Early Development, supra* n. 1 at p. 150, see also C.C. McCaul, "Precursors of the Bench and Bar in the Western Provinces" (1925) 3 *Canadian Bar Review*, p. 25.

[5] See William Peter Ward, "The Administration Of Justice In The North West Territories 1870–1887", M.A. Thesis, Department of History, University of Alberta, 1968, p.1.

[6] In the case where colonists took peaceful possession of virgin land such as occurred in Rupert's Land they were deemed to bring with them such of the laws of England as were reasonably applicable to the new colony, see, J.E. Cote, "The Introduction of English Law Into Alberta".(1964) 3 *Alberta Law Review*, p. 262, see also Desmond H. Brown, "Unpredictable and Uncertain: Criminal Law in the Canadian Northwest Before 1886" (1979) 17 *Alberta Law Review*, pp. 498–9 for a very readable explanation of the details of the reception of English law into the North Western Territories.

After the provisions of the Charter came into effect and for a century thereafter, there were very few people to be governed according to its terms. Because the area to be governed was so large, the Charter provided that if a crime was committed in a place where the Governor and Council were not located, then it was lawful to send the accused together with the witnesses to the place where the Governor was located, or to England, for trial.[7] As long as the Company's trading posts rimmed Hudson's Bay, the rudimentary justice provisions of the Charter of 1670 were sufficient, but as trading advanced to the south with European settlement in its wake, an additional system of justice became necessary.[8]

In 1774, the Company built Cumberland House in the lower Saskatchewan River valley thereby challenging the traders in the area who were arriving from Lower Canada.[9] What followed was a bitter, intensely fought and often violent trade war.[10] The criminal law provisions of the Charter proved inadequate to deal with such a conflict.[11] Moreover, in order that a jury trial might be conducted, many of the Europeans charged with serious offences had to be sent for trial, together with all the necessary witnesses, to England on the Company's ships,[12] a process which could take one or two years.[13] An alternative and slightly less arduous procedure was to send the accused to Lower Canada for trial.[14] In addition to the long delays involved, there were also great costs and the occasional hazards of voyage in such a process. For these reasons, the British Parliament enacted the Canada Jurisdiction Act of 1803.[15]

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[7] Oliver, *Canadian Northwest: Early Development*, *supra* n. 1 at p. 150, see also McCaul, "Precursors of the Bench and Bar", *supra*.n.4 at p. 25.

[8] See Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p.2 and Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 52.

[9] McCaul, "Precursors of the Bench and Bar", supra n. 4 at p. 25.

[10] Idem.

[11] Ward indicates that according to the terms of the Charter, the Hudson's Bay Company only had jurisdiction over its own employees and therefore had no effective way of dealing with the outside trappers and traders. See Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p. 2.

[12] McCaul, "Precursors of the Bench and Bar", supra n. 4 at p. 26.

[13] Roy St. George Stubbs, *Four Recorders of Rupert's Land*, (Winnipeg: Peguis Publishers, 1967), p. 2.

[14] See generally Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6.

The Canada Jurisdiction Act, 1803

The Act provided that "any offences committed within any of the Indian territories[16] &c., shall be tried in the same manner as if committed within the provinces of Lower and Upper Canada."[17] As well, any person could apprehend offenders and bring them before a justice of the peace, or convey them directly to Upper or Lower Canada to be dealt with there.[18] Much was left uncertain by the provisions of the act, particularly whether it was meant to apply to the lands of the Hudson's Bay Territory, or just to those lands making up the Indian Territories.[19] "Although grave doubts were subsequently raised as to whether the Act applied to Rupert's Land, ... the Canadian courts assumed jurisdiction and beyond doubt issued process to run both civil and criminal in respect of matters and crimes whether arising in Rupert's Land or the Indian Territories."[20]

Eight years after the Act was passed, the Earl of Selkirk obtained a grant of land from the Hudson's Bay Company and the following year, in 1812, he established the Red River colony which until 1870, was the largest settlement in Rupert's Land.[21] There was much unrest and violent conflict attending the early years of the settlement because of the rivalry between the North West Company and the Hudson's Bay Company.[22] For that reason as well as a legal opinion obtained by Lord Selkirk to the effect that the Canada Jurisdiction Act of 1803 did not apply to Rupert's Land, a Royal Commission was established in England to investigate the problems in the North West.[23]

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[15] 43 Geo. III c. 138 (U.K.), the full title of which is, "An Act for extending the jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada."

[16] The Act created a new entity the "Indian territories" which were *not* defined by the terms of the Act.

[17] 43 Geo. III c. 138 (U.K.).

[18] See Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 501 and Stubbs, *Four Recorders of Rupert's Land*, *supra* n. 18 at p. 3.

[19] Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 52. Knafla says the Act was rendered virtually useless because of the distances involved and the poor definition of jurisdiction. Louis A. Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in Knafla, L.A. (ed.) *Law and Justice in a New Land: Essays in Western Canadian Legal History*, (Toronto: Carswell Company, 1986), pp. 35–36. McCaul notes that initially only the courts of Lower Canada could issue process but later, because of the convenience the Governor of Lower Canada certified that process for the offences could originate in Upper Canada as well. McCaul, "Precursors of the Bench and Bar", *supra*.n.4 at p. 27.

[20] McCaul, "Precursors of the Bench and Bar", supra n. 4 at p. 27. McCaul notes an instance of an accused, who in 1816 in Lower Canada, was convicted of murder as a result of the "Seven Oaks Battle" in Rupert's Land, and who was subsequently pardoned by the English authorities because of the doubtful validity of the 1803 Act (ibid. pp. 27–28).

The result of the Royal Commission's work was, "An Act for regulating the Fur Trade and establishing a Criminal and Civil Jurisdiction within certain parts of North America,"[24] passed by the British Parliament in 1821.[25] By its terms, the Canada Jurisdiction Act of 1803 was declared to apply to Rupert's Land. It further provided for the appointment of justices of the peace in Rupert's Land as well as the Indian Territories, "to sit and hold Courts of Record for the Trial of Criminal Offences and Misdemeanors."[26] The justices could not try cases of capital punishment; persons accused of such crimes were to be sent to Upper Canada for trial.[27] The 1821 Act also provided that none of its provisions should be understood to affect, "any Right Privilege Authority or Jurisdiction" which by law the Hudson's Bay Company was entitled to claim under its Charter.[28] That provision understandably caused considerable confusion as it provided for concurrent criminal jurisdiction over Rupert's Land by the British Crown and the Hudson's Bay Company.[29] Following the passage of the 1821 Act, "although both the Company and the Canadian courts retained their judicial responsibilities, in the end the company administered justice throughout its trading area because the courts which the Act of 1821 authorized, were never established."[30]

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[21] See generally Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 53.

[22] Idem.

[23] Ibid., and see Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 501 for details concerning the legal opinion obtained by Lord Selkirk. In 1815, the Hudson's Bay company established a penal Code, but it was very general; it had few substantive provisions and it provided for no courts or procedure. See Oliver, *Canadian Northwest: Early Development*, *supra* n. 1 at pp. 1285–1287 for the text.

[24] 1 & 2 Geo. IV, c. 66 (U.K.) (1821).

[25] Referred to hereafter as the 1821 Act.

[26] 1 & 2 Geo. IV, c. 66 ss. 10, 11, (U.K.) (1821).

[27] Ibid., s. 12.

[28] 1 & 2 Geo. IV c. 66 s. 14. The net effect of the Act was that, apart from capital cases, the Company's appointees, together with any justices of the peace appointed under the Act, were to have concurrent (con't)

In the same year that the 1821 Act was passed the Hudson's Bay Company and the North West Company merged, and thereafter did business under the former title. This brought to an end the conflicts which had formerly characterized their relations.[31] From that time to 1869, the administration of justice in the lands comprising what are now the prairie provinces, was in the hands of the Governor and Council of the Hudson's Bay Company.[32] During this period, and with the exception of the Recorders in Assiniboia,[33] there was a complete absence of any trained legal personnel associated with the Hudson's Bay Company. The result was that justice, when administered, was delivered in an *ad hoc*

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jurisdiction in Rupert's Land. See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 54. By the terms of the 1803 legislation the governor of British North America was given the authority to appoint justice's of the peace. Under the 1821 Act the Crown of England assumed the right to appoint justices but never did so because the new Hudson's Bay Co. established an effective legal system and appointed its own justices. See Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 501 n. 26.

[29] For a detailed examination of the provisions of the 1821 Act as well as the confusion caused by section 14, see Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at pp. 502–504.

[30] Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at pp. 5–6, see also David M.L. Farr, "The Organization of the Judicial System In the Colonies of Vancouver Island and British Columbia, 1849–1876" (1967) 3 *University of British Columbia Law Review*, 1–35, p. 1 concerning the non–appointment of justices of the peace by Upper Canada.

[31] See Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at pp. 504–505.

[32] See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 54.

[33] According to Holdsworth, the office of the Recorder was created in 1835 by the Municipal Corporations Act. (5 & 6 William IV, c. 76 ss. 103–107 (1835) (U.K.). It was primarily intended to provide a means whereby some of the larger English boroughs could obtain a separate court of quarter sessions presided over by a salaried lawyer. The Recorder was a Crown appointment from among the barristers of five years or more standing at the Bar and was the sole judge of the court. William S. Holdsworth, *A History of English Law*, (7th ed.) (London: Sweet and Maxwell, 1969), p. 145.

fashion.[34] In addition to the lack of trained legal personnel, no judicial machinery existed for the settlement of disputes until 1839 and then it was restricted to the jurisdiction of Assiniboia which surrounded the Red River colony.[35] Moreover, prior to the appointment of the first Recorder in 1839, there was no system of justice to speak of in Rupert's Land; crimes were dealt with on an ad hoc basis and serious offenders were sent for trial to Upper or Lower Canada.[36] The appointment of a Recorder in Rupert's Land, marked the beginnings of a very basic and local judicial structure.

The Beginnings of Organized Justice In The Prairie West.

In 1839, Adam Thom[37] was appointed the first Recorder of Rupert's Land which made him the chief administrator of legal affairs for the territory. Although appointed to a judicial office, Thom also had responsibilities similar to those of an Attorney General.[38] By virtue of his appointment he was the governor's legal adviser, a senior member of the Governor's Council[39] and was also in charge of the criminal trial process.

According to his biographer[40] it appears that during Thom's term as Recorder, serious criminal charges would commence with a complaint or an arrest followed by a hearing before a justice of the peace. The justice, after hearing the representations and witnesses would either dismiss the charge or commit the accused for trial. Trials for serious criminal offences were conducted before a jury, in a court presided over by the Governor, the Recorder and the other officials making up the Governor's Court.[41]

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[34] See McCaul, "Precursors of the Bench and Bar", *supra*.n.4 at pp. 25, 28, see also Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 54.

[35] See Harvey, "The Early Administration of Justice In the North West", *supra* n. 2 at p. 171.

[36] McCaul notes that between 1810 and 1825, a large number of criminal offenders were sent for trial in the Canadas. McCaul, "Precursors of the Bench and Bar", supra n. 4 at p. 31.

[37] Adam Thom was called to the Bar of lower Canada in 1837, thus becoming the first judicial officer in Rupert's land with any legal training. Paradoxically, he was followed in office by Major Caldwell, the Governor of Assiniboia who had no legal qualifications at all. See Harvey, "The Early Administration of Justice In the North West", *supra* n. 2 at p. 181.

[38] See Stubbs, *Four Recorders of Rupert's Land*, *supra* n. 18 at p. 5ff for a history of Thom's tenure as Recorder which included the drafting of ordinances for the approval of the Council, and the administering of the judicial structure including the justices of the peace and local constables.

[39] D. Colwyn Williams, "The Dawn of Law on the Prairies" (1962) 27 *Saskatchewan Bar Review* 126–133, (1963) 28 *Saskatchewan Bar Review*, 17–26, 63–90, p. 130. The governor's Council furnished all the members of the Governor's court which was the supreme court of Rupert's Land. All cases tried before it were tried by a jury. Ibid., p. 131.

[40] Stubbs, *Four Recorders of Rupert's Land*, *supra* n. 18 at pp. 13–15.

An interesting account of one of these early proceedings is given by Horace Harvey in his, "Early Administration of Justice In The North West."[42] This describes the trial of Pierre Sayer on a charge of illegal fur trading which was held in the Governor's Court on May 17th, 1849.[43] The trial was held before a jury of twelve, many of whom had sat on previous cases held that same day.[44] The Chief Factor was named as prosecutor, however no mention is made in the account of his taking any active part in the trial or of being represented by anyone who did play an active role.[45] As a result of a last minute decision, the accused, Sayer, was represented by a friend.[46] There is also no mention by Harvey of a grand jury being summoned to find an indictment prior to the trial. From the available records, it appears that Recorder Thom summoned a grand jury only twice during his eleven year tenure.[47]

Four other Recorders followed Thom in office, the last of whom Recorder John Black (1862–1870), remained in office until 1870 when the northwestern territories including Rupert's Land, became part of Canada.[48]

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[41] Idem.

[42] (1934) 1 Alberta Law Quarterly 1–15, 171–194, at pp. 178–181.

[43] Idem.

[44] Idem.

[45] Idem.

[46] Idem.

[47] The grand juries were summoned in 1839 and 1844, in each of the cases the charge was murder, the grand jury found the indictment, and the accused was later acquitted at trial. See Stubbs, *Four Recorders of Rupert's Land*, *supra* n. 18 at pp. 19–22.

[48] Canada Act 33 Vict. c. 3 s. 1 (U.K.) which amended 32 and 33 Vict. c. 3, "An Act for the temporary (con't)

The grant of Rupert's Land to Canada by the British Crown brought to an end the judicial franchise which Charles II had originally extended to the Hudson's Bay Company two hundred years earlier. For the most part the provisions for justice made by the company were adequate; it will be recalled that outside the Red River settlement, Rupert's Land was very thinly populated and relatively few serious crimes ever occurred.[49] However to describe the system of justice as adequate is not to say it met all of the basic requirements. One commentator has described the company's legal system as being primitive and ineffectual because of the absence of an effective police force,[50] another writer characterized the justice system as being biased and designed to meet the commercial needs of the company.[51] Future events were to prove that until the arrival of the North West Mounted Police in 1874, there was no competent way to administer law and order in the North West Territories beyond the bounds of the established communities and trading posts.

The Administration Of Justice And The Prosecution Of Offences In The North West Territories Between 1870–1905

The North West Territories Are Established

Most of the written judicial history of the prairie west prior to 1870 was that of the

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Government of Rupert's Land and the Northwestern Territories". See McCaul, "Precursors of the Bench and Bar", *supra* n. 4 at p. 32 for a list of all the recorders and see Stubbs, *Four Recorders of Rupert's Land*, *supra* n. 18 at for the details of their periods in office.

[49] See Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at pp. 9–10.

[50] D.C. William, "Review of *Substantial Justice*, by D. and L. Gibson" (1972) 37 *Saskatchewan Law Review*, p. 157.

[51] Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p. 9.

Red River settlement and its surrounding district of Assiniboia.[52] Nothing of consequence happened on the prairies west of that settlement until the years 1869–1871. At that time, following the insurrection at Red River a large number of Riel's supporters left Manitoba and settled in what was then the North West Territories.[53]

It was during this period that the formal history of Canadian administered law and justice in the North West Territories began.[54] In 1868, the Hudson's Bay Company surrendered Rupert's land to the British Crown,[55] which then made a grant of the lands to the Dominion of Canada.[56]

In 1869, the Canadian government, in anticipation of the North West Territories coming under Canadian jurisdiction, passed "An Act for the temporary government of Rupert's Land and the North–Western Territory when united with Canada."[57] As its title suggests, the Act provided for an interim government in the North West Territories until a permanent arrangement could be made; and for the appointment of a Lieutenant–Governor who was to "make provision for the administration of justice therein."[58] The legislative life of this Act which was to have expired in 1870[59] was twice extended by parliament in 1870[60] and 1871.[61]

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[52] See Knafla, "From Oral to Written Memory",*supra* n. 19 at p. 47ff.

[53] Idem.

[54] It theoretically began because, as will be shown, the Canadian authorities were not actually able to exercise control over the prairie west until 1874.

[55] This was done by the provisions of the Rupert's Land Act (1868) 31 & 32 Vict. (U.K.).

[56] Ibid. See Williams, "The Dawn of Law on the Prairies", supra n. 39 at pp. 63–70 for a history of events leading to the return of Rupert's Land to Canada and see Peter W. Hogg, *Constitutional Law of Canada*, (2nd ed.) (Toronto: Carswell Co., 1985), p. 31.

[57] 32 & 33 Vict. c. 3 (Can) 1869.

[58] Ibid., s. 2.

[59] Ibid., s. 7.

[60] 33 Vict. c. 3 s. 36 (Can) 1870, The Manitoba Act.

[61] 34 Vict. c. 16 (Can) 1871.

The net result of all this legislation together with the Constitution Act of 1871,[62] was to establish the Province of Manitoba and the North West Territories[63] out of what had once been Rupert's Land and the Indian Territories.[64] However, rather than Canadian or Territorial officials being in charge of the administration of justice in the newly formed Territories, the Hudson's Bay Company and its personnel were to continue administering the law until new provisions were made.[65] This remained the state of affairs until the North West Mounted Police marched west in 1874.[66]

The Attorney General of the North West Territories

Following Confederation in 1867, the Canadian Parliament established the office of the Attorney General of Canada.[67] This official whose office was constituted somewhat differently from that of his English colleague,[68] was also the Attorney General for the North West Territories.[69] As such, he was the one who could exercise the traditional prerogatives concerning prosecutions for crime in that jurisdiction.

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[62] 34 & 35 Vict. c. 28 (U.K.) 1871.

[63] The North West Territories then comprised what are today the North West Territories, the Yukon Territory and the provinces of Alberta and Saskatchewan. See Hogg, *Constitutional Law of Canada*, *supra* n. 56 at p. 31 n. 39, concerning additional territory in present day northern Manitoba, Ontario and Quebec which was part of the North West Territories in 1870.

[64] See Hogg, *Constitutional Law of Canada*, *supra* n. 56 at p. 31.

[65] The Temporary Government of the North–West Territories Act, 32 & 33 Vict. c. 3 s. 5 (Can) (1869). See also Harvey, "The Early Administration of Justice In the North West", *supra* n. 2 at p. 5.

[66] Brown indicates that nothing more substantial could have been done by the Canadian Government concerning the administration of justice in the prairie West until there was a police force able to back up the process and orders of the court. Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at pp. 508–509. Ward says it was the Cypress Hills Massacre of 1873 which spurred the Canadian government to pass the Administration of Justice Act 1873—which, had it not occurred, may well have meant an even longer wait for remedial legislation. See Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p. 20. Marcel indicates that following the Riel insurrection of 1869–70 in Manitoba, when several hundred families left Manitoba and went west, "the country beyond Manitoba, possessed only an embryonic organization. See Marcel Giraud, "Metis Settlement In the North-West Territories" (1954) 7 *Saskatchewan History*, p. 1.

[67] See "An Act respecting the Department of Justice" 31 Vict. c. 39, (Can) 1868.

[68] Ibid., s. 2.

[69] The details are discussed below.

The Department of Justice Act of 1868[70] established the Minister of Justice as the chief Law Officer of the Crown. As head of the Department of Justice, he was to be the chief legal adviser to the government and also, *ex officio*, Attorney General of Canada. However, unlike the English Attorney General, he was also given executive responsibility for the administration of justice within the competence of the federal government.[71] Thus in a single portfolio the Canadian government had combined the traditional functions of the English Lord Chancellor, Home Secretary and Attorney General; a concept which the British had also considered implementing but rejected.[72]

The provisions of the Temporary Government of Rupert's Land Act 1869[73] transferred executive authority over Rupert's Land from the Hudson's Bay Company to the Canadian Government. By the provisions of that Act and the Department of Justice Act, the Attorney General of Canada became the Attorney General of the North West Territories when it entered the Dominion in 1870[74] thus exercising prosecutorial authority there. The extent of his authority to prosecute criminal offences was that traditionally exercised by the Attorney General of England, together with any additional authority provided to him by-Canadian legislation.[75] It is of significance that no reference was made to the Attorney General in any of the provisions of those statutes dealing with criminal prosecutions or the administration of justice in the North West Territories.

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[70] The full title of which was, "An Act respecting the Department of Justice" 31 Vict. c. 39, (Can) 1868, referred to hereafter as the Department of Justice Act.

[71] Ibid., s. 2.

[72] See J.Ll.J. Edwards, *Ministerial Responsibility for National Security*, (Ottawa: Minister of Supply and Services Canada, 1980), p. 8. As a Minister of the Crown, the Attorney General was also a member of the Cabinet, Department of Justice Act 1868, 31 Vict. c. 39 s. 2, whereas traditionally, the English Attorney General had not been a member of the Cabinet. See generally, J.Ll.J. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), p. 158ff.

[73] 32 & 33 Vict. c. 3 (Can) 1869.

[74] Ibid., see also Stenning, *Appearing for the Crown*, *supra* n. 2 at pp. 77–78.

[75] See the Department of Justice Act 1868, 31 Vict. c. 39 s. 2 and see also Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 77.

The North West Territories Acts of 1873

In 1873, the Canadian Parliament enacted two pieces of legislation concerning the North West Territories. The first was the North West Territories Amendment Act of 1873,[76] and the second was "An Act respecting the Administration of Justice, and for the establishment of a Police Force in The North West Territories."[77] By the former, all Canadian legislation relating to the executive government of Canada and the several departments thereof were put into force in the North West Territories.[78] As well, certain portions of the federal legislation concerning criminal trial procedure were made applicable.[79] Through the passage of the North West Territories Amendment Act, the Canadian government created a single criminal jurisdiction in the Territories and made the provisions of Canadian criminal law and procedure applicable to that area.[80] Whereas previously the criminal law was a mix of English and colonial legislation, thereafter, a person accused of crime in the North West Territories, would be charged, tried and if convicted, sentenced in accordance with Canadian law.[81]

By the terms of the second piece of legislation, the Administration of Justice In the North West Territories Act 1873,[82] provision was made for the appointment of stipendiary magistrates.[83] These were granted jurisdiction in the North West Territories to hear and try, in a summary way, a wide range of criminal offences in which the property value at issue did not exceed $100.00 or for which the maximum punishment did not exceed two years imprisonment.[84] For more serious offences in which the maximum sentence did not exceed seven years in prison, any two stipendiary magistrates sitting together as a Court, and without the intervention of a grand or trial jury, could hear and determine the case.[85] All other serious cases such as murder or treason were, following committal proceedings, to be sent to Manitoba for trial by a Queen's bench judge and jury.[86] For offenders convicted in the Territories, it was provided that if there were no gaol convenient to the trial location, the North West Mounted Police were to confine offenders for the duration of their sentence.[87]

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[76] The full title was, An Act further to amend the "Act to make further provision for the government of the North West Territories", 36 Vict. c. 34 (Can) (1873).

[77] 36 Vict. c. 35 (Can) (1873).

[78] 36 Vict. c. 34 s. 6, this would also have included the Department of Justice Act of 1868, 31 Vict. c. 39 (Can) (1868).

[79] Ibid., and see Schedule A.

[80] Particularly the summary trials provisions. This will be considered below. See also Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 509.

[81] Ibid., p. 510.

[82] 36 Vict. c. 34 (Can) (1873).

The passage of the Administration of Justice Act[88] not only marked the first time judicial officers and courts were established by Canadian authority,[89] but it also created the North West Mounted Police which would initially administer the law in the West.[90] By the terms of the Act the Commissioner and every superintendent were *ex officio* justices of the peace.[91] Members of the force were required to attend upon and carry out all lawful instructions of "any Judge, Stipendiary Magistrate, or Justice of the Peace," as required and which may lawfully be performed by constables.[92] The following year an amendment[93] was passed making the Commissioner of the North West Mounted Police an *ex officio* Stipendiary Magistrate.[94]

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[83] Ibid., s. 2.

[84] Ibid., s. 2 and s. 3.

[85] Ibid., s. 4. The magistrates had concurrent jurisdiction over these offences with any Queen's Bench Judge from Manitoba, sitting in the North West Territories.

[86] Ibid., s. 5. The trial procedure was to be that in force in Manitoba, but upon conviction, sentencing was to be according to the law of the North West Territories.

[87] Ibid., s. 7.

[88] 36 Vict. c. 35 (Can) 1873.

[89] See Harvey, "The Early Administration of Justice In the North West", *supra* n. 2 at p. 6.

[90] Their involvement in the administration of the criminal law will be discussed below.

[91] 36 Vict. c. 35 (Can) 1873 s. 15.

Hence, with the two Acts of 1873, not only was Canadian criminal law introduced into the North West Territories but also the North West Mounted Police, who would serve as constables, justices of the peace, prosecutors, judges, courts and gaolers.[95]

The Applicability of the Canadian Criminal Legislation of 1869

The North West Territories Acts of 1873 did not make detailed provision for criminal trial procedure. Instead, parts of extant Canadian criminal legislation[96] were adopted for use.[97] Only one of these, The Summary Trial of Indictable Offences Act[98] is relevant here.[99]

Under the terms of the North West Territories Act, 1873,[100] all of the Summary Trials Act of 1869,[101] with the exception of the consent provisions[102] was brought into force in the North West Territories. The Summary Trials Act, as it applied to the Territories, allowed Magistrates without the consent of the accused, to try a specified set of offences using summary conviction procedures.[103] By s. 3 of the Administration of Justice In The North West Territories Act 1873,[104] a wide range of offences including theft, violent assaults, woundings, obstruction of justice and others, were placed within the absolute jurisdiction of the Stipendiary Magistrate.[105] He was to use the applicable procedure set out in the Summary Trials Act of 1869, when conducting trials for those offences.[106]

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[92] Ibid., s. 19(2).

[93] 37 Vict. c. 22 s. 15 (Can) 1874; moreover, by the same section the Assistant Commissioner and Inspectors were all made *ex officio* justices of the peace.

[94] By further amendment in 1879, a similar provision was made for the Assistant Commissioner, 42 Vict. c. 36 s.8.

[95] See Knafla, "From Oral to Written Memory", *supra n.* 19 at p. 48.

[96] 32 & 33 Vict. cc. 2932 (Can) 1869.

[97] See 36 Vict. c. 34 s. 6 and Schedule A.

[98] The full title is "An Act Respecting the prompt and summary administration of Criminal Justice in certain cases" 32 & 33 Vict. c. 32 (Can) 1869. It will be referred to hereafter as the Summary Trials Act 1869.

[99] The portions of the other Acts which were adopted concerned procedural matters unrelated to prosecutorial authority.

[100] 36 Vict. c. 34 s. 6 (Can) 1873.

[101] Ibid., s. 3.

[102] 32 & 33 Vict. c. 32 (Can) 1869.

A review of some of the provisions of the Summary Trials Act of 1869, reveals similarities with the prosecuting justice of England between the sixteenth and eighteenth centuries.[107] For example, s. 4 specifies that where the accused does not plead guilty;

> the Magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge and if he states he has a defence, the Magistrate shall hear such defence, and shall then proceed to dispose of the case summarily.[108]

Similarly, s. 13 provided that the Magistrate may require the attendance of witnesses, and the Magistrate may bind over all persons whom he considered to be necessary.[109]

Nowhere in the Territories legislation of 1873 or that of 1869 is there mention of a public prosecutor.[110] It is clear from the undefined use of terms such as "complainant"

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[103] Ibid., ss. 2, 3.

[104] 36 Vict. c. 35 s. 3 (Can) 1873.

[105] Idem.

[106] 36 Vict. c. 34 s. 6 (Can) 1873.

[107] See Chapter III *supra* for a discussion of the English justice of the peace as public prosecutor.

[108] 32 & 33 Vict. c. 32 s. 4.

[109] Ibid., s. 13.

[110] 32 & 33 Vict. cc. 29–32 (Can) 1869. This legislation included a Summary Trials Procedure Act, a Summary Convictions Act, a Pre–Trial Procedures Act and a Speedy Trials Act.

"prosecutor",[111] and "complainant or informant"[112] in various provisions of those Acts, that the rights of a private prosecutor in England were being fully continued in Canada.[113] This was true whether the prosecution was a summary conviction proceeding, an indictable offence to be tried by summary procedure, or an offence tried on indictment before a jury.

Amendments to the North West Territories Acts 1875–1886

After 1873 there were a number of amendments to the North West Territories Acts concerning the administration of justice in the Territories. In 1875, the Territories were divided into judicial districts, and courts presided over by Stipendiary Magistrates were to be regularly held in each district.[114] The Stipendiary Magistrate's summary jurisdiction was increased to include offences for which the maximum punishment did not exceed five years imprisonment.[115] For offences with a greater punishment but excluding death, the Stipendiary magistrate could try the matter summarily, with the consent of the accused; otherwise by a jury of six.[116]

Two years later the Stipendiary Magistrates' summary jurisdiction was further increased to cover offences for which the maximum punishment was not greater than seven years.[117] The legislation also stipulated that, where possible, all trials were to follow procedure "similar to the procedure upon summary trials".[118] In 1877, it was enacted that in cases where the punishment exceeded seven years imprisonment, the accused was to be allowed "to make full answer and defence by counsel learned in the law."[119]

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[111] See for example 32 & 33 Vict. c. 29, ss. 26, 28, or 29 (Can) 1869.

[112] See for example ibid. c. 31, ss. 30, 34, or 40.

[113] See Stenning, *Appearing for the Crown*, *supra* n. 2 at pp. 75–76.

[114] The North West Territories Act, 1875, 38 Vict. c. 49 s. 59.

[115] Ibid., s. 64. In capital cases, the trial was to be by a Stipendiary Magistrate and a jury not exceeding eight, and the trial was to be held in the North West Territories. Queen's Bench judges from Manitoba continued to have concurrent jurisdiction with Stipendiary Magistrates in the North West Territories, (ibid).

[116] Idem.

[117] The North West Territories Amendment Act 1877, 40 Vict. c. 7, s. 7. By this section, the absolute jurisdiction offences (those offences which fell within the absolute jurisdiction of a magistrate sitting without a jury), first created by 36 Vict. c. 35 s. 3, (Can) 1873 were re-enacted, capital cases were to be tried by a Stipendiary magistrate, two justices of the the peace and a jury of six, but in no case was a grand jury to be called in the North West Territories, (ibid).

The several North West Territories Acts and amendments were consolidated by the North West Territories Act of 1880.[120] Moreover in an attempt to increase the legal competence of the judiciary,[121] it was required for the first time that any newly appointed Stipendiary Magistrates were to have been lawyers of at least five years standing in any Province of Canada. In keeping with their expected competence, s. 76 enumerated a wide range of offences which could now be tried in a summary fashion by a Stipendiary Magistrate without a jury, with the most serious offences triable by a Stipendiary Magistrate sitting with a justice of the peace and a jury of six.[122] Only those persons convicted of an offence punishable by death had a right of appeal.[123]

Absence Of Provisions Concerning Public Prosecutions

The 1880 Act was the last consolidation of the North West Territories Acts prior to 1886.[124] By its terms and those of its predecessors various parts of Canadian criminal legislation were made operative in the North West Territories.[125] However, aside from providing for the number of jury challenges granted to the Crown in treason trials,[126] neither the amendments made to the North West Territories Acts after 1873 nor any of the applicable Canadian criminal legislation adopted by them, made any provision for a public prosecutor. The right of a citizen to bring a private prosecution for crime in the North West Territories were the same as those of a private prosecutor in England; a public prosecutor did not exist in either jurisdiction.

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[118] Idem.

[119] Idem.

[120] 43 Vict. c. 25. This was the second consolidation, the first was by the Act of 1875, 38 Vict. c. 49 (Can). It would be the provisions of this Act by which Louis Riel and his associates were tried at Regina in 1885.

[121] Idem.

[122] Idem.

[123] Ibid., s. 77.

[124] The North West Territories Act, 49 Vict. c. 50 (Can) 1886.

[125] See for example, the North West Territories Act 1880, 43 Vict. c. 25 s. 96 and the attached schedule of federal Acts in force.

[126] 43 Vict. c. 25 s. 76(11).

The North West Mounted Police and the Administration of Justice Between 1874 and 1886

One of the difficulties of administering justice in the North West Territories in the 1870's was the fact that apart from the North West Mounted Police, "there were few suitable men in the North West to appoint as justices of the peace."[127] The most suitable civilians were the factors of the Hudson's Bay posts, but they were often away from their stations on company business. Few other residents had any legal knowledge or background and most were uneducated.[128]

It was for that reason that the North West Mounted Police were established in such a radical departure from their British counterparts. Not only did they police and prosecute, but they also acted as magistrates and justices of the peace, passing judgement on criminals as well as apprehending them.[129] Thus it was that when the Force set off from Ontario in 1874 to police the North West Territories, "in a very real sense the law and its enforcers went West together."[130]

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[127] Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at pp. 34–35.

[128] Idem.

[129] R.C. Macleod, *The Northwest Mounted Police and Law Enforcement 1873–1905*, (Toronto: University of Toronto Press, 1976), p. 5; Macleod suggests that the NWMP were organized and created in order to allow for the peaceful settlement of the North West Territories, (ibid.).

[130] Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 511. That remained the state of affairs until the Supreme Court of the North West Territories was created in 1886. See the (con't)

In 1875, a year after the arrival of the Force, the Minister of the Interior was able to tell Parliament that "Lawlessness and crime are now almost unknown in the Territories, life and property are as safe there as in other parts of the Dominion."[131] Although the land was more peaceful, there was, nonetheless, dissatisfaction with the multiplicity of functions exercised by the police. One of the main sources of discontent had to do with the considerable judicial authority they exercised by presiding in most of the courts held in the Territories prior to 1886.[132] This appears not to have been a source of concern in sparsely populated areas, but in the larger centres the police, as justices and magistrates, became increasingly unpopular.[133]

Prior to the creation of the Supreme Court of the North West Territories in 1886, the courts over which the magistrates and justices presided were "simple, unsophisticated and at times informal. Officers of the North West Mounted Police prosecuted most criminal offences while the defendants spoke for themselves."[134] Few, if any, of the justices had legal training, and it is "quite probable that many of them conducted their judicial business according to the spirit rather than the letter of the law."[135] Until 1886, there would be no appeal from their judgements or those of the Stipendiary magistrates except in capital cases.[136]

North West Territories Amendment Act, 49 Vict. c. 25 ss. 4–16, see also Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p. 21, (Ward there gives 1887 as the date the court was created, but that is in error).

[131] As quoted in Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at, p. 37, n. 37.

[132] Ibid., p. 93.

[133] Ibid., pp. 93–94; Ward quotes from the *Prince Albert Times* of March 21st, 1884, which described the system of police courts as "monstrous, extraordinary, abnormal and utterly unconstitutional." Ibid.

[134] Ibid., p. 61.

[135] Ibid., p. 62. While s. 76 of the North West Territories Act of 1880 required that newly appointed Stipendiary Magistrates have at least five years standing at the bar, there was no similar provisions for justices of the peace and no provision was made for those already appointed to judicial office.

[136] The North West Territories Act 1880, 43 Vict. c. 25 s. 77.

The North West Territories Amendment Act of 1886,[137] changed the composition and structure of the courts in the North West Territories. Thereafter, while the judicial role of the North West Mounted Police was reduced, their prosecutorial role was not, and they or their successors continued to routinely prosecute in summary conviction proceedings until the fourth quarter of the present century.

There is no evidence of prosecutorial activity by the Attorney General or his agents in the North West Territories until the state trials of Riel and his associates in 1885.[138] During those contests, the prosecution was conducted by hand–picked Law Officers, headed by the Deputy Minister of Justice for Canada, George W. Burbidge.[139] The trials were conducted in accordance with the procedure and law established by the North West Territories Act, 1880.[140] At the time Riel was tried, in addition to the Attorney General's traditional prosecutorial prerogatives,[141] Canadian criminal legislation contained only two provisions which specifically mentioned the Attorney General.[142] However, neither of these were in force in the Territories in 1885.[143]

The North West Territories Act, 1886

The year following Riel's trial, the North West Territories Act, 1886 was passed and this put all Canadian criminal law into force in the Territories. This was supplemented by the applicable criminal law and procedure of England of 1870.[144] Prior to the passage of this Act, there was some controversy over the number of jurisdictions in the North West, and the body of criminal law in force in each jurisdiction.[145]

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[137] 49 Vict. c. 25 (Can) 1886.

[138] See Thomas Flanagan and Neil.Watson, "The Riel Trial Revisited: Criminal Procedure and the Law in 1885" (1981) 34 *Saskatchewan History*, 57–73, Sandra Bingaman, "The Trials of Poundmaker and Big Bear, 1885" (1975) 28 *Saskatchewan History*, pp. 81–94 and "The Trials of The 'White Rebels',1885", (1972) 25 *Saskatchewan History*, pp. 41–54, for a description of the legal aspects of Riel's trial and that of some of his co–conspirators who were also placed on trial in 1885.

[139] See Bingaman, "The Trials of Poundmaker and Big Bear, 1885" p. 81 and "The Trials of The 'White Rebels',1885" pp. 42–43 ibid.

[140] 43 Vict. c. 25 (Can) 1880, see also Flanagan and Watson, "The Riel Trial Revisited: Criminal Procedure and the Law in 1885", *supra* n. 138.

[141] See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 77.

[142] These were ss. 28 and 45 of the Pre–Trial Procedure Act, 32 & 33 Vict, c. 29 (Can) 1869, which concerned the preferring of indictments in certain cases and the Attorney General's right of reply.

[143] 43 Vict. c. 25 s. 96.

The Act of 1886 settled the matter conclusively by enacting that all the civil and criminal laws of England as they existed on July 15th, 1870 shall, as far as they are applicable, be in force in the North West Territories.[146] In addition, section 65 provided that the procedure in criminal cases in court would, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on July 15th, 1870; but no grand jury would be summoned or sit in the Territories.[147] These provisions clearly incorporated the common law right of private prosecution into the North West Territories, which as will be discussed later, was quite compatible with the applicable Canadian law concerning criminal trial procedure.

In addition to settling the question of which law applied to the Territories, the Act of 1886 also addressed the problem of structure and judicial composition of the Courts. A Supreme Court for the North West Territories consisting of a chief justice and five puisne judges was established.[148] The Act required that incumbents must be or have been, "a judge of a Superior Court of any Province, a Stipendiary Magistrate in the Territories", or a lawyer of ten years standing at the bar of any Province or in the Territories.[149] In addition to the Supreme Court, the act also created police magistrates[150] who were given jurisdiction over those summary conviction proceedings not specifically reserved to the Supreme Court judges.[151] As a pre–condition to appointment, police magistrates were to have been admitted, and practiced as a lawyer in any province in Canada for a period of not less than three years.[152]

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[144] 49 Vict. c. 50 ss. 11, 65 and 112 (Can) 1886, this was the revised North West Territories Act and should not be confused with the earlier amending Act, 49 Vict. c. 25 which the revised Act replaced together with all the preceding North West Territories Acts.

[145] See Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 508ff., for a detailed discussion concerning the controversy, and see also Knafla, "From Oral to Written Memory", *supra* n. 19 at p. 52.

[146] 49 Vict. c. 50 s. 11 (Can) 1886. Many of the new provisions of this Act were first enacted in the North West Territories Amendment Act, 49 Vict. c. 25 (1886). For the sake of convenience all references will be made to the consolidated Act. See also Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 512 and Harvey, "The Early Administration of Justice In the North West", *supra* n. 2 at p. 14.

[147] 49 Vict. c. 50 s. 11.

[148] Ibid., ss. 41–50.

With these latter changes in place, the Act provided for a legally trained judiciary unconnected with the North West Mounted Police, thereby addressing the need for an impartial bench which was also seen by the public to be independent.[153] The final section of the Act laid down that unless otherwise provided, every Act of the parliament of Canada was in full force in the Territories.[154] The 1886 Act placed into effect some of the most modern and comprehensive criminal law anywhere in Canada.[155] With a few minor changes, it was in force when the provinces of Alberta and Saskatchewan were created in 1905.[156]

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[149] Ibid., ss. 42, 43.

[150] Police magistrates had the same jurisdiction as two justices of the peace sitting together, but less jurisdiction than the former Stipendiary magistrates had in the Territories, see ibid., s. 64(3). Police magistrates were not police officers acting as magistrates; they were the forerunners of today's Provincial Court Judge.

[151] Ibid., s. 64(3) and see s. 66.

[152] Ibid., s. 64(4).

[153] See Ward, *The Administration Of Justice In The North West Territories 1870–1887*, *supra* n. 5 at p. 61, for a discussion of the public concern expressed because North West Mounted Police Officers were also judicial officers. By the provisions of ss. 30–32 of the North West Territories Amendment Act 1886, 49 Vict. c. 25, the office of Stipendiary Magistrate was abolished. Incumbents were not automatically re-appointed as Supreme Court Judges.

[154] 49 Vict. c. 50 s. 112 (Can) 1886.

[155] See Brown, "Criminal Law in the Canadian Northwest Before 1886", *supra* n. 6 at p. 512.

[156] See Cote, "The Introduction of English Law Into Alberta" *supra* n. 6 at p. 265.

CHAPTER V

Private Prosecutions in the Territories Under the 1892 *Code*

On July 9th, 1892, Canada's *Criminal Code* received royal assent and became the first of its kind in the British Empire.[157] By s. 112 of the North West Territories Act 1886, all of the substantive provisions of the 1892 *Code* were already in force in the Territories. After 1892, the authority of a private prosecutor in the Territories had not been altered, and remained as it was prior to the passage of the 1892 *Code*.

Summary Convictions Prosecutions

In Part LVIII of the *Code*, concerning summary convictions, the prosecutor was variously described as "the complainant" or "informant" or "prosecutor" but as with the earlier legislation of 1869, none of these terms were given a precise definition.[158] By the provisions of Part LVIII, the prosecutor, private or public, could be represented by a "counsel or attorney or other person authorized in that behalf."[159] No distinction was made between the Attorney General or private prosecutors; both had the same authority to commence and prosecute summary conviction proceedings.[160]

Prosecutions On Indictment

Prosecutions for indictable offences in the North West Territories under the 1892 *Code* were not much altered from what they had been previously. For example, as with the prior legislation, the term "prosecutor" was not explicitly defined and the context of its use in Part LI dealing with general trial procedure, made it quite clear that private prosecutions were intended.[161] This conclusion gains added strength from the "almost complete absence in Part LI of any terminology which suggests an intention to distinguish between the rights of public and private prosecutors in such trials."[162]

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[157] Desmond H. Brown, "The Canadian Criminal Code 1892: A Comparative Study in Codification", Doctoral Dissertation, University of Alberta, 1986, (to be published by University of Toronto Books, in 1987), p. 2, the Act creating the code, was *The Criminal Code*, 1892, 55-56 Vict. c. 29, referred to hereafter as the 1892 *Code*. For a thorough discussion of the process and political forces which were involved in the creation of *The Criminal Code* 1892, see Brown, id.

[158] See for example, *The Criminal Code* 1892 ss. 850, 852, 854 and see also Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 136.

[159] *The Criminal Code* 1892 s. 845.

[160] Ibid., Part LVIII; see also Stenning, *Appearing for the Crown*, *supra* n. 2 at pp. 136ff.

Summary Trials of Indictable Offences

Part LV dealt with prosecutions using the summary trials of indictable offences procedure. This part is taken almost directly from the Summary Trials of Indictable Offences Act of 1869[163] discussed previously, and the position of a private prosecutor under this part was unchanged from what it had been.[164]

Jury Trials Of Indictable Offences

The various sections of the 1892 *Code* concerning procedure in jury trials tried on indictment, preserved the traditional right of any person to initiate a private prosecution.[165] Any person who had reasonable and probable grounds to believe another had committed an indictable offence could initiate prosecution proceedings.[166] In the North West Territories (and later in Alberta), in those cases which were to be tried by a jury, the pre–trial procedure of the 1892 *Code* required a hearing before the justice of the peace at which the accused and the prosecutor were to be present.[167] Each of them could be represented by their counsel.[168] If the accused was to be committed to stand trial, the justice was authorized to bind over someone to prosecute, and as well to bind over those witnesses whose evidence, in his opinion, was required.[169]

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[161] See for example, *The Criminal Code* 1892 ss. 661, 668(4).

[162] See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 141.

[163] 32 & 33 Vict. c. 32 (Can) 1869.

[164] Part LV of the 1892 *Code*, ss. 786 and 795 continued to contain directions to the magistrate conducting the trial to examine the witnesses for the prosecution and to bind over those witnesses whom the magistrate believed to be necessary at the trial. There would be no change in this wording until the major revisions made to the *Criminal Code* in 1953–54.

[165] See generally, Stenning, *Appearing for the Crown*, *supra* n. 2 at pp. 146–147.

[166] *The Criminal Code* 1892, s. 558.

[167] Ibid., ss. 577–598.

In a departure from its general thrust of codifying the common law, s. 675 of the 1892 *Code*, specifically retained all of the previous common law powers and procedure of England as they applied to jury trials. Unless such powers had been expressly altered by the Act or were inapplicable to it, they were available to the Court and parties involved in proceedings with "regard to trials by jury, jury process, juries or jurors."[170] Therefore, all of the common law rights of a private prosecutor as they existed in England prior to July 15th, 1870,[171] and unless expressly altered by the 1892 *Code* were preserved by s. 675.[172] A review of its provisions dealing with the arraignment and trial of an accused on an indictment before a jury,[173] shows that very few of them dealt with prosecutorial authority.[174] Quite clearly, private prosecutions were not only intended and provided for, but prosecutions by a public prosecutor in the North West Territories were not contemplated.

The Prosecutorial Authority of the Attorney General in the North West Territories Prior to 1905

Although the rights of a private individual to initiate and conduct prosecutions in the Territories under the 1892 *Code* were substantially the same as those of his or her English counterpart prior to 1905, the authority and prerogatives of the Attorney General were not. The 1892 *Code* codified certain of the common law prerogatives of the Attorney General as well as increasing his control over the prosecution of several offences specified in the *Code*.

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[168] Ibid., s. 586.

[169] Ibid., s. 598.

[170] Ibid., s. 675.

[171] See The North West Territories Act 1886, 49 Vict. c. 50, s. 11.

[172] See *The Criminal Code* 1892, s. 675.

[173] Ibid., see Part L, "Arraignment" ss. 652–658, and LI "Trial" ss. 659–741.

[174] See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 141.

Statutory Prerogatives

In Part LI dealing with trials by indictment, s. 732(1) authorized the Attorney General[175] to direct a stay of proceedings of a criminal prosecution at "any time after an indictment has been found against any person for any offence."[176] Subsection (2) of that section authorized the Attorney General to delegate "such power in any particular court to any counsel nominated by him."[177] While the section appears to codify the Attorney General's common law *nolle prosequi* power, it will be recalled that at common law the *nolle prosequi* prerogative was personal to the Attorney General, although it could be communicated to the court by someone acting on his directions.[178] The Attorney General's common law prerogative had thus been extended by s. 732(2) because that sub-section set up a power of general rather than specific delegation.[179]

Statutory Control Over Certain Prosecutions

New to the 1892 *Code* were several provisions requiring consent from the Attorney General, or in certain cases the Court, before prosecutions could be commenced or continued.

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[175] s. 3(b) of *The Criminal Code* 1892 confirmed that in the North West Territories, the Attorney General was the Attorney General of Canada.

[176] Ibid., s. 732.

[177] Idem.

[178] *R. v. Dunn* (1843) 174 E.R. 1009, 1010.

[179] See Stenning, *Appearing for the Crown, supra* n. 2 at p. 142ff.

In Part XLIII, concerning "Procedure in Particular Cases", a list of six offences were set out which required the Attorney General's consent prior to commencement of proceedings.[180] These, together with sections 542 and 546[181] were the only provisions of the 1892 *Code* which placed restrictions on the otherwise unrestricted rights of the private prosecutor in the North West Territories.[182]

Preferring an indictment is dealt with in section 641 which sets out the four different ways in which an indictment could be preferred before a grand jury.[183] These were;

1. Anyone bound over to prosecute whether or not the accused had been committed to stand trial could prefer an indictment before the Grand Jury,[184]
2. The Attorney General personally or anyone by his direction or with his written consent could prefer an indictment before a Grand Jury,[185]
3. Anyone with the written consent of a judge of any court of criminal jurisdiction could prefer an indictment before a Grand Jury,[186] or,
4. Anyone could prefer a bill of indictment directly before any court of criminal jurisdiction by order of that court.[187]

Due to the sparse and scattered population from which to draw the jurors, and unlike the other Canadian jurisdictions, there was no grand jury in the North West Territories.[188] The grand jury procedure of the *Criminal Code* was not applicable and thus there was only one method by which an indictment could be preferred and this was in accordance with number 4. above—directly before the court which was to try the charge by prior order of that court.[189] Nothing in section 641 as it applied to the North West Territories, distinguished between the rights of a private or a public prosecutor. Indeed, in 1900, Parliament added an amendment to section 641 [190] so that counsel acting for the Crown in those jurisdictions with grand juries, would not have to obtain the written consent of a judge in order to prefer an indictment before a grand jury.[191] The wording of the amended section[192] referred only to "counsel for the Crown" and there was nothing in section 641 or the Part dealing with the preferring of indictments, that indicated the amended section should not apply to counsel for a private prosecutor as well as for a public one. This is mentioned here only to show that in the preferment of indictments under the 1892 *Code* , no preference was made as between private or public prosecutors and there was no separate scheme for prosecutions by public prosecutors.[193]

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[180] *The Criminal Code* 1892, ss. 543–545, 547–549.

[181] Ibid., These sections required the consent of the Governor General and the Minister of Fisheries respectively before prosecutions could be commenced.

[182] These sections dealt with offences concerning official secrets, judicial corruption, unseaworthy vessels, explosive substances, defaced coins, criminal breach of trust and proceedings against foreign nationals for offences not committed in Canada; *The Criminal Code* 1892, ss. 542–549, see also Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 145.

[183] Stenning, ibid., at p. 139 sets out only three categories. However the fourth category is very important because there was no grand jury procedure in the North West Territories, (The North West Territories Act 1886, s. 11) and therefore there was only one method to prefer an indictment there.

[184] *The Criminal Code* 1892 s. 641(1).

[185] Ibid., s. 641(2).

[186] Idem.

[187] Idem.

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[188] The North West Territories Act 1886, s. 11.

[189] *The Criminal Code* 1892 s. 641(2). Stenning argues that by the time of the 1892 *Code*, prosecutions by *ex officio* informations were not used because s. 642 of the *Code* abolished trials on coroner's inquisitions so that the only indictment procedure was that set out in section 641 of the *Code*. See Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 139 and see the judgement of Lamar J. in *R.* v. *McKibbon* (1984) 38 C.R. (3d) 305, 326–327 (S.C.C.).

[190] 63–64 Vict. c. 46 s.3. The amendment added sub-section 2 to s. 641 which stated: "The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice."

[191] See W.J. Tremeear, *The Criminal Code and the Law of Criminal Evidence in Canada*, (Toronto, Ontario: Canadian Law Book Company, 1902), p. 560; Prior to the amendment if a prosecutor outside of the Territories had not taken the precaution at the preliminary inquiry to have himself bound over to prosecute, then judicial consent would be required before the prosecutor (whether public or private) could prefer an indictment before the grand jury.

[192] See n. 190 *supra*.

With the exception of the right of reply,[194] and those offences which required his consent to prosecute,[195] the Attorney General was not given additional prosecutorial authority when prosecuting in the Territories prior to 1905.

The Attorney General—No Greater Authority Than a Private Prosecutor

The absence of a grand jury and grand jury procedure was of fundamental importance to the powers of the Attorney General of Canada when prosecuting in the North West Territories. In the Territories he had less prosecutorial authority under the provisions of section 641 of the 1892 *Code*, than a provincial Attorney General in one of the provinces had when acting under the same section. There were two reasons for this. Firstly, under section 641(2),[196] a provincial Attorney General could prefer an indictment directly before the grand jury, and secondly, he shared concurrent jurisdiction with a judge of a superior court in granting permission to private prosecutors to prefer an indictment directly before the grand jury. However, in the Territories under section 641(2),[197] because there was no grand jury, the Attorney General had no greater powers of prosecution than did a private prosecutor. They were on exactly the same footing. Each had to obtain the permission of the court to prefer and prosecute a charge before the trial court.[198] Whether, prior to 1907,[199] the Attorney General[200] could have preferred an indictment [201] directly before the trial court in the Territories using his common law power to file an *ex officio* information appears never to have been the subject of judicial consideration.[202] Section 641(4) of the 1892 *Code* stipulates that: "Save as aforesaid, no bill of indictment shall after the commencement of this Act be preferred in any province of Canada."[203] Whether the Attorney General's prerogative to file an *ex officio* information would have been upheld in the North West Territories in the face of section 641(4) of the 1892 *Code* is now a moot point.[204]

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[193] See *R. v. Patterson* (1895) 2 C.C.C. 339, 344, (Ont.C.A.), which notes that prior to the adoption of the *Criminal Code*, the only limitation to the preferment of indictments in Canada were those contained in 49 Vict. c. 174 s. 140 (Can) 1886, but that "in accordance with the recommendations of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of section 140, to the case of all indictments." (ibid). The Commission's recommendations were concerned with the unfairness of permitting an indictment to be preferred before a grand jury, an indictment being found and an accused being placed on trial, upon what might turn out to be an unfounded charge for which there had been no preliminary investigation or even notice to the accused.

[194] *The Criminal Code* 1892, s. 661.

[195] Ibid., ss. 543–549.

[196] *The Criminal Code* 1892.

[197] Idem.

Aside from the state trials arising out of the Riel Rebellion there is no history of public prosecutions in pre–confederation Western Canada. Indeed the legislation and the tradition upon which it was based, from the time of the Charter granted to the Hudson's Bay Company in 1670 down to the introduction of the 1892 *Code*, supported a system of private prosecutions for crime. Where then did the model for the system of public prosecutions now employed in Alberta come from? As will be seen in the next chapter it is a mixture of systems having its roots in Scotland and Upper Canada.

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[198] Ibid., s. 641(2).

[199] An amendment, s. 873A, was added to the *Criminal Code* by c. 146 R.S.C. 1906 which rectified the problem. The amendment is discussed in chapter VII below.

[200] Being the Attorney General of Canada prior to Alberta joining confederation in 1905 and the Attorney General of Alberta prior to the 1907 amendment referred to in the preceding note.

[201] For a criminal proceeding encompassed by s. 67 of the North West Territories Act, 1886.

[202] There appear to be no reported decisions on this issue.

[203] *The Criminal Code* 1892.

[204] See also Stenning, *Appearing for the Crown*, *supra* n. 2 at p. 139.

VI. THE PUBLIC PROSECUTIONS MODEL FROM UPPER CANADA

By the middle of the nineteenth century in Upper Canada, the conduct of criminal prosecutions for all types of serious crime had become central to the functions of the Attorney General and his law officers.[1] But as time went on, this active participation in criminal prosecutions on the part of the Crown proved to be an increasingly difficult problem.[2] There were several reasons for this. The increase in the population and its spread across the province required a major expansion of the courts, which in turn increased the Attorney General's supervisory responsibilities for criminal prosecutions as well as other matters connected with the administration of justice.[3] Finally, the growing involvement of the Attorney General in purely political matters meant that he had less time to spend prosecuting, or supervising criminal prosecutions.[4]

Although the Attorney General appointed senior counsel to appear as his agents in the superior courts, such officers—who came to be referred to as "Crown Counsel"—could not exercise the privileges or prerogatives of the Attorney General. If those were to be exercised the personal attendance of the Chief Law Officer was required.[5]

A solution to the dilemma was wanted and in 1850 various suggestions for reform were made to a Select committee of the Legislative Assembly of the Province of Canada.[6] A key recommendation proposed to the Committee by the Hon. James Small and the Hon. William Meritt, was to locate the administration of justice, including supervision of prosecutions at the local level.[7] This was to be accomplished by salaried county prosecutors, as opposed to the then current practice of retaining counsel on an *ad hoc* basis.[8] In line with this recommendation and in view of the pressures of office being experienced by the Attorney General, as well as difficulties being encountered at the county courts of Quarter Sessions,[9] the County Crown Attorneys Act of 1857[10] was passed.

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[1] See Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986), p. 63ff.

[2] Ibid., p. 111.

[3] Ibid., p. 109.

[4] Idem.

[5] Idem.

[6] See Stenning, *Appearing for the Crown*, *supra* n. 1 at pp. 112–114.

Judge Gowan and the Prosecutions Model From Scotland

Although several individuals had made proposals concerning the reform of the system of criminal prosecutions in Upper Canada, one man, the Honourable James R. Gowan,[11] was responsible for the drafting of the County Crown Attorneys Act which was subsequently enacted by the Legislature of the Province of Canada for use in Upper Canada.[12] Moreover, there can be no doubt that in drafting the bill to go before the legislature, Gowan drew heavily on the system of public prosecutions employed at the time in Scotland.

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[7] Idem.

[8] Ibid. While the Committee conducted hearings and took evidence, it never issued a final report containing any recommendations for change. See Canada, Special Committee of the Legislative Assembly appointed to inquire into the public income and expenditure of the Province, 1850. First and Second Reports (Toronto: Levell & Gibson, 1850).

[9] Every county in Upper Canada had its own County Court and a Court of General Quarter Sessions of the Peace. The jurisdiction of the former was almost entirely civil while that of the latter was entirely criminal. The Court of Quarter Sessions was held four times a year and the Judge of the County Court, was also the Chairman (or Judge) of the Court of Quarter Sessions. See generally, "An Act respecting Courts of Oyer and Terminer and General Gaol Delivery and of Assize and Nisi Prius", "An Act respecting County Courts", and "An Act relating to the Court of General Quarter Sessions of the Peace", in the Consolidated Statutes For Upper Canada, 1859 cc. 11, 15 and 17 respectively. The problems arising at the court of Quarter Sessions are discussed below.

[10] The full title of the Act was "An Act for the Appointment of County Attorneys, and for other purposes, in relation to the Local Administration of Justice in Upper Canada", 20 Vict. c. 58 (Can) 1857. This Act will re referred to hereafter as the County Crown Attorneys Act.

[11] Gowan had been a lawyer prior to being appointed a County Court Judge for the district of Simcoe in 1843. See Mark Winston Fisher, "Sir James Robert Gowan", M.A. Thesis, Department of History, University of New Brunswick, 1971, pp. 18–19.

[12] 20 Vict. c. 59 (Can) 1857. I am deeply indebted to Dr. D. H. Brown of the History Department of the University of Alberta who drew my attention to Gowan's involvement with the County Crown Attorneys Act and its origin in the prosecution system of Scotland.

The Gowan Editorials

In a series of editorials written by Gowan in the *Law Journal* between 1855 and 1857, he first detailed the great need for a county crown prosecutor, and then made a number of proposals concerning the duties of such an official.[13] In his first editorial on the subject, entitled "The Prosecution of Offenders — County Attorneys,"[14] Gowan notes that whereas Crown Counsel are appointed to handle the paperwork and organize the prosecutions on indictment in the Assize courts of Upper Canada, no such Crown officers appear at the courts of Quarter Sessions—the criminal prosecutions brought there must be privately prosecuted.[15] As a result there was often confusion and delay. The necessary witnesses were not in attendance, the indictments, for want of proper legal skills, were poorly drafted and the private prosecutor had to bear all the costs of the prosecution. In addition any fruits of the conviction went not to the prosecutor but to the Crown. Gowan believed the private prosecutor should not have to pay such costs because it was "not a proceeding to give satisfaction to *him*, but to vindicate public justice".[16] Gowan also complained of the dilemma faced by the judge when a private prosecutor brought an action but did not retain counsel. The judge must examine "the witnesses [re–examining them if needed], and cross–examines the defendant's witnesses, and is compelled to combine in some measure the office of Judge and Crown Prosecutor."[17] Such proceedings obviously put the bench in an anomalous position. This problem was made much the worse whenever the defendant had employed counsel; for the judge had "either tacitly to allow justice to be defeated by permitting half answers and doubtful or colourable assertions to go before the Jury as evidence, or to elicit the whole truth by examination and cross–examination of witnesses."[18]

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[13] In the fall of 1854, Gowan formed a silent partnership with two other men to produce the *Law Journal*, which was later renamed the *Upper Canada Law Journal*. His purpose in forming and publishing the *Journal* was his great desire to express himself on matters of legal reform and improvement. A draft copy of Gowan's contract with his partners indicated that he was to supply the editorials, leading matter and correspondence for the *Journal* and that his involvement was to be kept secret. Gowan supplied a lump sum to begin the enterprise and paid all the start–up costs, but for the entire time of his involvement with the *Journal* he never received or asked for any return on his investments. Although he wrote the editorials, true to his contract, they were never attributed to him. The *Upper Canada Law Journal* later merged with the *Canadian Law Times* to become the *Canadian Bar Review*. See Fisher, *Sir James Robert Gowan*, *supra* n. 11 at pp. 47–54, and see A.H.U. Colquhoun, *The Hon. James R. Gowan*, (Toronto: 1884), pp. 85–86.

[14] (1855) *Law Journal* pp. 31–34.

[15] Ibid., p. 32.

[16] Idem.

In order to resolve the many problems which Gowan believed to plague the system of criminal prosecutions at Quarter Sessions, and to a lesser extent at the Assizes, he proposed that local Crown Attorneys be established in every county.[19] Such attorneys would be barristers of several years standing to be appointed by the government or the Attorney General with some tenure of office, a small salary and an entitlement to fees for each indictment and trial.[20] The duties which Gowan proposed for local Crown Attorneys were:

> To act for the Crown at the Quarter Sessions in the same way as the Attorney General, or other Crown officer, officiates at the Assizes; to receive from Magistrates and Coroners the informations and papers in criminal cases; to inspect these papers, and examine the character and sufficiency of the evidence; to secure the necessary documents and the attendance of all necessary witnesses; in a word, to get up the evidence and arrange all things ready for the trial. To attend, also, at the Assizes, and assist the Attorney or Solicitor–General, or Queen's Counsel, (as the case may be), and in the absence of such an Officer to conduct the business himself. And, moreover, to assist Magistrates, by his advice, in their primary investigation of important cases.

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[17] Idem.

[18] Ibid., p. 33.

[19] Ibid., pp. 33–34.

[20] Ibid., p. 34.

> The County Attorney might also see to the enforcement of forfeited recognizances—appear for the Crown on application to bail prisoners—might have the charge of prosecutions, under the laws for summary convictions connected with the revenue or public domain—in fact, [have charge of] all cases prosecuted in Petit Sessions by Public Officers in the name of the Queen.[21]

Gowan's second article concerning the county Crown Attorneys appeared eleven months after the first. In this he makes his first reference to the fact that in Scotland, public agents rather than private prosecutors manage all the criminal prosecutions.[22] He also noted that in England, the practice of private prosecutions for crime was under vigorous public attack,[23] and the issue was being considered by the English parliament.[24] In his editorial, Gowan referred to, and quotes from, the final report of the English "Select Committee on Public Prosecutions" issued in November of 1855, which contained proposals for a system which would employ a local public prosecutor.[25] Gowan noted that the proposals made by the Select Committee in England were similar to the ones made in his last editorial,[26] and he again set out the reasons favouring a county Crown Attorney system for Upper Canada and the duties such Attorneys should have.[27]

In the June 1857 issue of the *Law Journal*, under the heading "Local Crown

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[21] Idem.

[22] "County Attorneys, The Prosecution of Offenders." (1856) 2 *Law Journal* pp. 12–15, at p. 13.

[23] See J.Ll.J. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), p. 339ff, for a discussion of the problems surrounding private prosecutions for crime in England in the 1850's.

[24] Gowan, "County Attorneys, The Prosecution of Offenders," *supra* n. 23 at pp. 13–14.

[25] Ibid. In order to quote from the report Gowan must obviously have had a copy or access to one. The Scottish system of prosecutions was explained at length to the Select Committee by the Lord Advocate, and similar information on the same topic had been provided to another committee, the Criminal Law Commissioners by Chief Justice Denman in 1845. Mr. Justice Denman also recommended the Scottish system of criminal prosecutions, see Edwards, *Law Officers of the Crown*, *supra* n. 23 at, p. 345.

[26] That Editorial appeared in February of 1855 which was prior to the Select Committee's Report of November 1855.

[27] Gowan, "County Attorneys, The Prosecution of Offenders," *supra* n. 22 at pp. 14–15. The suggested duties were identical to those contained in his first editorial, quoted *supra*.

Prosecutors,"[28] Gowan's third editorial on the subject stated: "the readers of the *Law Journal* will remember that from almost the commencement of the *Journal*, the institution of County Attorneys was advocated, and it is satisfactory to find that the arguments we urged had weight, and that our suggestions had been acted on."[29] He went on to report the passage of the County Crown Attorneys Act by the legislature and promised a full review of its provisions in a later issue.[30]

In March of 1859, Gowan wrote his last editorial on the subject of "County Crown Attorneys."[31] His purpose was to describe the County Crown Attorneys Act of 1857.[32] By way of introduction to what was at the time a radical departure from the tradition of private prosecutions, Gowan very briefly refers to the criminal prosecutions system of France, Iceland and Scotland.[33] In describing the Scottish system he says:

> In Scotland, private prosecutions are almost unknown to the law. Attached to every Sheriff's Court there is an officer called the Procurator Fiscal, whose duty it is to attend to public prosecutions, and whose remuneration is by fees; among other duties he is required to receive information of offences, to prosecute suspected persons before a magistrate, and to arrange if necessary for prosecution before a higher tribunal; in the latter case the whole of the evidence is reported to the Crown Counsel in Edinburgh, by whom all further proceedings are conducted. At the head of the Crown Counsel is the Lord Advocate, or supreme public accuser.[34]

Gowan completed the piece by describing the main provisions of the County Crown

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[28] (1857) Vol. 3 pp. 117–118.

[29] Idem.

[30] Idem.

[31] That was also the editorial's title, (1859) 5 *Law Journal* pp. 49–50.

[32] 20 Vict. c. 59 (Can) 1857.

[33] Gowan, "County Crown Attorneys," *supra* n. 31 at p. 49.

[34] Idem.

Attorneys Act.[35]

The County Crown Attorneys Act, 1857

Concerning the chief provisions of the Act[36], there was to be in every county a local Crown Attorney who was to be a barrister of not less than three years standing, appointed by the Governor, to aid in the local administration of justice.[37] Every county Crown Attorney was to:

1. Receive and examine all documents and depositions connected with criminal charges or proceedings which were referred to them by justices of the peace, magistrates or coroners. Where necessary, conduct further investigations and gather further evidence, and then arrange for the appearance of the necessary witnesses at trial.[38]
2. Attend to all criminal business at Quarter Sessions and, on behalf of the Crown, to institute and prosecute proceedings for felonies and misdemeanours. In doing so, the Crown Attorneys were to have (with the exception of the *nolle prosequi* power) the same authority as the Attorney General.[39]
3. Watch over the cases privately prosecuted at Quarter Sessions, and without unduly interfering with the rights of private individuals, "to assume wholly the conduct of the case where justice towards the accused seems to demand his interposition."[40]
4. Deliver any necessary papers or other information connected with the criminal

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[35] Ibid., pp. 49–50.

[36] 20 Vict. c. 59 (Can) 1857.

[37] Ibid., ss. I–III.

[38] Ibid., s. V.

[39] Idem.

[40] Idem.

business at the Court of Assize to the Crown Counsel in attendance there, and assist Crown Counsel as necessary or in their absence, to conduct the criminal business at that court.[41]

5. Institute and conduct proceedings before justices of the peace concerning any matters punishable on summary conviction. In carrying out these duties, the county Crown Attorney was authorized to institute and conduct such proceedings on a written complaint, or as Public Prosecutor, in all those cases wherein the public interest required it to be done.[42]
6. Provide, upon written request, advice and instructions to magistrates concerning criminal proceedings or inquiries brought before them.[43]
7. Perform all such other duties as the Governor, may by regulations require.[44]

The county Crown Attorney was to be paid on the basis of a system of fees from the public treasury for all his work in connection with public prosecutions.[45] With the passage of this Act,[46] in combination with several related Acts,[47] private individuals could now, at no cost to themselves, ask the county Crown Attorney to prosecute summary matters; or institute and conduct proceedings on indictment at Quarter Sessions. Before the Act such matters had to be privately commenced before a justice of the peace or magistrate and privately paid for. Thus, Gowan's belief that private prosecutors should not have to pay the costs of criminal prosecution was at last realized.

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[41] 20 Vict. c. 59 s. V (Can) 1857.

[42] Idem.

[43] Idem.

[44] Idem.

[45] Ibid., s. VII.

[46] Ibid., particularly ss. V and VII.

[47] See "An Act respecting the Fees of Counsel and other Ministers of Justice", and "An Act respecting the Administration of Justice in Criminal Matters in Upper Canada", in The Consolidated Statutes of Upper Canada, 22 Vict. cc. 119, 120 respectively, 1859.

A comparison of Gowan's brief description of the Scottish public prosecutions system[48] with the provisions of the County Crown Attorneys Act, reveals the similarities between the two. Certainly no such system, even remotely similar, existed in England at that time.[49]

There is no doubt that Gowan, on his own initiative, raised the issue of County Crown prosecutors with Sir John A. Macdonald, and later prepared, at Macdonald's request, the draft bill for the County Crown Attorney's Act.[50] It was Sir John A. Macdonald who subsequently introduced Gowan's bill in the legislative assembly where it was "accepted by both branches of the legislature almost without debate."[51] In speaking of the effect of the bill, Colquhoun describes it as "one of the most sweeping measures ever passed in Canada respecting the administration of the criminal law, and at once accomplished a most beneficial change in the prosecution of crime and that without trenching upon existing rights."[52] This comment was undoubtedly a reference to the fact, that for the first time in the British Empire, Gowan had succeeded in superimposing a public prosecutions system upon a system of private prosecutions for crime, and in so doing, kept alive the private citizen's right to institute a criminal prosecution. In a later passage, and still speaking of the County Crown Attorneys Act, Colquhoun writes: "the Crown Attorney was in many particulars, placed in a similar position to the Public Prosecutor in Scotland, and the excellent system existing in that country had evidently been kept in view when framing this measure."[53]

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[48] This will be discussed in greater detail below.

[49] Gowan's draft of the County Crown Attorneys Act, pre–dated the first Director of Public Prosecutions Act (1879) in England by over twenty years.

[50] See Johnson J. K. (ed.), *The Papers Of The Prime Ministers; (Vol. 1) The Letters of Sir John A. Macdonald* (Ottawa: Public Archives of Canada, 1968), p. 421. In a letter written to Gowan on Jan. 31st, 1857, Macdonald acknowledges receipt of documents prepared by Gowan concerning the "County Prosecutors" and asks Gowan to draft a Bill. See also Colquhoun, *The Hon. James R. Gowan, supra* n. 13 at p. 70. I again record my gratitude to Dr. Brown for drawing Macdonald's letter to my attention.

[51] Colquhoun, *The Hon. James R. Gowan, supra* n. 13 at p. 73.

[52] Idem.

Public Prosecutions for Crime in Scotland in 1850

To understand the procedure for the prosecution of crime in Scotland, it is necessary to review briefly the office of the Lord Advocate who is the chief Law Officer of the Scottish government and head of Department of Criminal Justice.[54]

Unlike the system of private prosecutions for crime existing in England in the nineteenth century, the chief feature of the Scottish system was the public prosecution of crime under the control and direction of the Lord Advocate.[55] In Scotland, neither the police nor private citizens prosecuted crimes. All proceedings were taken at the Direction of the Lord Advocate.[56]

The Lord Advocate as Public Prosecutor

From its earliest days, the office of the Lord Advocate has always been concerned with the prosecution of serious crime.[57] The Lord Advocate's paramount right to unilaterally invoke the criminal law is traced back to an Act of the Parliament of Scotland in 1587[58] which authorized him in combination with the Treasurer to pursue serious crimes even though the parties concerned had taken no action or had reached a private agreement.[59]

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[53] Idem.

[54] See Susan R. Moody, *Prosecution in the Public Interest*, (Edinburgh: Scottish Academic Press, 1982), p. 19.

[55] See Scottish Law Commission, *The Legal System of Scotland*, (Edinburgh: H.M.S.O., 1975), p. 23.

[56] Ibid., p. 24.

[57] Idem.

[58] An Act respecting Criminal Justice, 1587, 21 James 6, c. 57 (Scotland).

[59] See George W.T. Omond, *The Lord Advocates of Scotland*, (2 Vols.) (Edinburgh: David Douglas, 1883), p. 48, see also W.G. Normand, "The Public Prosecutor In Scotland",(1938) 54 *Law Quarterly Review*, p. 345ff.

Since the passage of that Act and two others (1579, 1587) the Lord Advocate's right to prosecute all crimes has been unquestioned.[60] With the exception of prosecutions for treason and blasphemy, private prosecutions for other crime were still common in Scotland in the 1600's.[61] However, private prosecutions did not proceed by indictment but by way of a bill of "criminal letters".[62] The only person who could proceed by indictment in the name of the Crown was the Lord Advocate.[63] Gradually, during the seventeenth and eighteenth centuries, the Lord Advocate assumed complete control over the administration of the criminal law because of the costs involved with private prosecutions.[64] Although private prosecutors could still bring criminal actions; if they did so, in addition to the trouble and expense of the proceeding, they were also exposed to a claim for expenses by the accused if the trial resulted in an acquittal.[65] On the other hand, the complainant in proceedings conducted by the Lord Advocate was not liable for the expenses of prosecution. As a result private prosecutions for crime in Scotland almost disappeared.[66] As the practice fell into disuse, the citizen's right to bring a prosecution for crime "became so far subordinate to that of the Lord Advocate, that he was required to obtain the Lord

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[60] Omond, *The Lord Advocates of Scotland*, (Vol 1), ibid. p. 49.

[61] J.Ll.J. Edwards, *The Law Officers of the Crown*, (London: Sweet and Maxwell, 1964), p. 275.

[62] In Scotland, there was neither a preliminary inquiry process or grand jury proceedings. Therefore, to initiate a private criminal prosecution it developed that an application first had to be made to the Court for a bill of Criminal Letters; see Normand, "The Public Prosecutor In Scotland", *supra* n.59 at p. 348, and Moody, *Prosecution in the Public Interest*, *supra* n. 54 at p. 18. Such requests have become very rare—there have been only two in the twentieth century. See J. Ll. J. Edwards, *The Attorney General, Politics and the Public Interest*, (London:Sweet and Maxwell, 1984) at pp. 300–301.

[63] Edwards, *The Attorney General, Politics and the Public Interest*, *supra* n. 62 at p. 275.

[64] Normand, "The Public Prosecutor In Scotland", *supra* n.59 at p. 346.

[65] Ibid., p. 347.

[66] Idem.

Advocate's concurrence" to institute proceedings.[67]

Unlike the Attorney General of England, who only prosecuted in State Trials, the Lord Advocate in Scotland became responsible for the prosecution of all serious crime. By the nineteenth century the volume of work had grown so large that it became necessary for the Lord Advocate to establish a central bureau in Edinburgh, called the Crown Office, to provide himself and his assistants with support.[68] The latter were known collectively as Crown Counsel, and each was responsible for separate districts in Scotland and was the Lord Advocate's link to the procurator fiscals who were the local county Crown prosecutors.[69]

The Procurator Fiscal

The duties of the procurator fiscal as local Crown prosecutor can be traced back to 1701 when he is described in legislation as the "pursuer for criminal cases" in the Sheriff's court.[70] By the time of the mid–nineteenth century, the procurator fiscal had become fully established as the local public prosecutor, and while nominally appointed by the Sheriff,[71] but subject to the directions of the Lord Advocate or his deputies.[72]

Every county in Scotland, has a Sheriff's Court with jurisdiction over crimes committed within the county.[73] Trials may be on indictment before the Sheriff sitting alone or with a jury, and in minor cases by summary procedure.[74] Normally the criminal prosecutions which took place in the Sheriff's Court were conducted by the procurator, who by 1850, had become the Lord Advocate's prosecutor in that court.[75] In very serious or complex matters, the Lord Advocate might direct counsel from the Crown Office to prosecute in the Sheriff's Court in place of the procurator.[76] All actions for crime in the Sheriff's Court were either brought by the procurator or with his concurrence.[77]

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[67] Ibid. The Lord Advocate's control over criminal prosecutions was not absolute as it was ultimately subject to the high Court of Justiciary, which was the supreme court of Scotland, see Andrew O. Gibb, *A Preface To Scots Law*, (3d ed.) (Edinburgh: W. Green & Son, 1961), p. 144.

[68] Moody, *Prosecution in the Public Interest*, supra n. 55 at p. 19.

[69] Idem.

[70] Ibid., p. 18. The Sheriff's court was a criminal court with both summary and solemn jurisdiction, that is, jurisdiction to hold a trial by jury for serious offences. See Scottish Law Commission *The Legal System of Scotland*, *supra* n. 55 at p. 23.

[71] See Gerald H. Gordon, "Institution of Criminal Proceedings In Scotland", (1968) 19 *Northern Ireland Legal Quarterly*, p. 252.

[72] Ibid., p. 253

Serious crimes were reported initially to the procurator fiscal by the police or by the aggrieved parties.[78] In the early nineteenth century police did not prosecute in Scotland as they began to do in England.[79] Instead they reported the details of the crime to the procurator, who, having received their report or a complaint from a private individual would then investigate the matter taking depositions from the complainant and other witnesses. Following a consideration of the evidence, he then determined whether charges should be laid, and in very serious matters would send the depositions and other materials to the Crown Office for their consideration and instructions.[80] The less serious matters would be prosecuted directly by the procurator who was a lawyer trained in the criminal law.[81] All of the costs incurred in the actions prosecuted by him were paid for from public funds.[82]

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[73] See Gibb, *A Preface To Scots Law*, *supra* n. 67 at p. 6

[74] See Normand, "The Public Prosecutor In Scotland", supra n. 59 at p. 349.

[75] See Gordon, "Institution of Criminal Proceedings In Scotland" *supra* n. 71 at p. 253.

[76] See Normand, "The Public Prosecutor In Scotland", supra n. 59 at p. 350.

[77] Moody, *Prosecution in the Public Interest*, *supra* n. 54 at p. 18; although still possible through the procedure of a bill of criminal letters, private prosecutions for crime had become very rare and in practice the procurator fiscal was the sole criminal prosecutor. See Gordon, "Institution of Criminal Proceedings In Scotland" *supra* n. 71 at p. 251.

[78] See Edwards, *The Attorney General, Politics and the Public Interest*, *supra* n. 62 at pp. 298–299.

[79] See Scottish Law Commission.*The Legal System of Scotland*, supra n. 55 at p. 24.

[80] Edwards, *The Attorney General, Politics and the Public Interest*, *supra* n. 62 at pp. 298–299. The serious charges would normally be prosecuted by Crown Counsel in the high Court. See Normand, "The Public Prosecutor In Scotland", supra n. 59 at pp. 351–352.

Thus, when Gowan prepared his draft bill for the County Crown Attorneys Act in 1857, there was a smoothly operating public prosecutions system in Scotland to use as a model. That system was directed by the Lord Advocate from a central office with the assistance of senior Crown Counsel. In every county, there was a local crown prosecutor who supervised the investigations, examined the depositions, arranged for the witnesses and prosecuted the crimes in the local court. In more serious matters, he reported to his superiors, the Crown Counsel and took instruction from them. The local Crown prosecutor was a lawyer, was paid from public monies and his prosecutions were brought at no expense to the complainant or informant.

There can be no doubt that Gowan modeled the County Crown Attorneys Act of 1857 upon the system existing at the time in Scotland. In so doing, he successfully bridged the gap between the English system, based entirely on private prosecutions for crime, and the Scottish system in which private prosecutions had almost become extinct . Gowan's system of county Crown prosecutors as laid down in the Act of 1857, remained in use in Upper Canada until Confederation and in Ontario after that time.[83] The only other province to ever adopt similar legislation was Manitoba.[84]

As already noted, by the terms of the County Crown Attorneys Act local Crown prosecutors were, with the exception of the *nolle prosequi* power legislatively given the same authority and prerogative powers as the Attorney General. As well the act detailed their other duties and responsibilities. Without specific enabling legislation Gowan's County Crown Attorneys would have had no greater authority than a private prosecutor. In Alberta public prosecutions are conducted in accordance with Gowan's model but without the specific legislation. The following chapter examines the authority of the local Crown prosecutor to prosecute on behalf of the Attorney General of Alberta.

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[81] Normand, "The Public Prosecutor In Scotland", supra n. 59 at p. 351.

[82] Moody, *Prosecution in the Public Interest*, supra n. 54 at p. 21.

[83] See Stenning, *Appearing for the Crown*, *supra* n. 1 at pp. 114–121.

[84] Ibid., p. 124ff. In 1875, the Manitoba Legislature enacted the "Crown Attorneys Act", 38 Vict., c. 13 (1875), which was modeled upon the Upper Canadian legislation.

VII. PROSECUTIONS FOR CRIME IN ALBERTA AFTER 1905

Introduction

The Crown Prosecution model used in Alberta is similar to the one adopted for use in Upper Canada as embodied in the County Crown Attorneys Act.[1] As demonstrated in the last chapter, the County Crown Attorneys Act was based upon the Scottish system of public criminal prosecutions, and not upon the English system of private prosecutions. However, the *Canadian Criminal Code* is rooted in the common-law tradition of England as are the prosecution powers and prerogatives of the Attorney General.[2] It is in the blending of these two traditions that problems have arisen.

At the present time in Alberta, there are 155 full-time Crown counsel working for the Attorney General's Department.[3] Of that number, 140 are appointed as agents of the Attorney General.[4] These lawyers are distributed across the thirteen jurisdictions where the Attorney General maintains full-time offices.[5] Those lawyers employed to prosecute for the Crown in the 13 judicial offices make up the majority of full-time Crown prosecutors.[6]

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[1] 20 Vict. c 59 (Can) 1857. See also the discussion in the previous chapter.

[2] See generally Desmond H. Brown, "The Canadian Criminal Code 1892: A Comparative Study in Codification", Doctoral Dissertation, University of Alberta, 1986, (to be published by University of Toronto Books, 1987), see also s. 2(e), Department of The Attorney General Act, R.S.C. 1980, c. D-13 and Chapter IV *supra.*

[3] This information was kindly provided to me by Mr. Neil McCrank, Associate Deputy Attorney General of Alberta, Criminal Law Division, Department of The Attorney General during a telephone interview which took place on July 24th, 1987.

[4] Ibid. Full time Crown prosecutors are first hired by the Department of the Attorney General into one of the Crown prosecution offices where they are under the supervision of the Chief Prosecutor for the area. After a time, usually one year, the Chief Prosecutor may recommend that the prosecutor concerned by appointed as a full–time agent of the Attorney General. The Attorney General reviews that recommendation together with any other relevant material and then either issues a full time agency appointment or not. This information was kindly provided to me by Mr. Del Perras, Deputy Attorney General of Alberta during a telephone interview on June 12, 1987.

[5] Interview with Neil McCrank, *supra*, n. 3, see also the section dealing with the Criminal Law Division in *The Annual Report of the Attorney General of Alberta, 1985-86.*

[6] Idem. There are also a number of lawyers employed in the head office as well as the specialized units of the Criminal Law Branch such as appeals and special prosecutions.

Most *Criminal Code* prosecutions are conducted by these local Crown Prosecutors who, when prosecuting, are purportedly acting as agents of the Attorney General.[7]

There is neither Provincial of Federal legislation which directly authorizes *Criminal Code* prosecutions by local Crown Prosecutors employed by the Attorney General of Alberta.[8] The question is thus raised, by what authority do local Crown Prosecutors purport to prosecute on behalf of the Attorney General? To answer that question, it will first be necessary to consider two other issues: the basis of the authority of the Attorney General to prosecute *Criminal Code* offences, and the extent of the right of a private citizen to prosecute under the *Criminal Code*. After considering those questions in their provincial context, it will then be possible to examine the prosecutorial authority of the local Crown Prosecutor in Alberta. How does that official's authority to prosecute *Criminal Code* offences differ from the private citizen's?

A. Alberta's Attorney General Is Established

On September 1st, 1905 Alberta and Saskatchewan became provinces of the Dominion of Canada.[9] Under the terms of the Alberta Act, the province was to enjoy the full right and privileges of the other provinces of the Dominion.[10] The Act further provided that all laws in force in the North West Territories prior to Alberta becoming a province continued in full force and effect unless and until repealed or revised by the appropriate authority.[11] Thus the legal system that was in place carried on smoothly and the criminal law remained essentially unchanged.[12]

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[7] Interviews with Mr. Del Perras, *supra* n. 4 and Mr. Neil McCrank, *supra* n.3.

[8] Some provinces do have specific legislation, see particularly; The Crown Attorneys Act R.S.O. 1980, c. 107; An Act Respecting Crown Attorneys, R.S.M. 1970, c. C–330; and, An Act Respecting Attorney-General's Prosecutors, R.S.Q., 1977, c. S-35.

[9] The Alberta Act, 4–5 Ed. VII, c. 3 s. 25 (Can.) 1905.

[10] Idem.

By the terms of the Constitution Act, 1867,[13] provincial legislatures were given exclusive authority to make laws in relation to the "administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in civil Matters in those Courts."[14] In response to that authority, one of the first pieces of legislation enacted by Alberta's legislature was the Attorney General's Act, of 1906[15] which replaced "The Attorney General's Ordinance."[16]

The Attorney General's Act, like the federal Department of Justice Act of 1868,[17] made the provincial Attorney General a cabinet minister.[18] As such, he or she was charged with the general responsibility for the administration of justice in the province.[19] The Act further established the Attorney General as the chief Law Officer of the Crown for Alberta[20] with all the powers and duties belonging to the Attorney General of England by law or by usage as far as they were applicable in the province.[21] Section 3(j) specifically authorized the Attorney General to consider and attend upon, bail applications, appeals in criminal cases and the preferring of indictments, and s. 3(j)(8) authorized him to appoint "counsel for the conduct of criminal business."[22]

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[11] Ibid., s. 16; This of course meant that the laws of England as they stood on July 15th, 1870, insofar as practicable, were also in force in Alberta. See W.G. Morrow,"An Historical Examination of Alberta's Legal System: The First Seventy-Five Years" (1981) 19 *Alberta Law Review*, p. 148.

[12] See Louis A. Knafla, "From Oral to Written Memory: The Common Law Tradition in Western Canada" in Knafla, L.A. (ed.) *Law and Justice in a New Land: Essays in Western Canadian Legal History*, (Toronto: Carswell Company, 1986) pp. 58–59.

[13] 30 & 31 Vict. c. 3 (U.K.) 1867, formerly the British North America Act.

[14] Ibid., s. 92(14).

[15] c. 6, S.A., 1906.

[16] C.O., c. 6, (1905). The Ordinance was the legislative instrument that had established an Attorney General for the North West Territories with authority to administer certain civil territorial affairs and advise the government in matters over which the Territorial Legislative Assembly had jurisdiction. The provincial Attorney General's Act closely followed the wording of the old Attorney General's Ordinance, adding one sub–section, s. 3(j), concerning the administration of criminal law. This sub–section was the only part of the Provincial Act which was not in the North West Territories Ordinance. It added sub–sections dealing with the other provincial matters as well.

[17] 31 Vict. c. 39 (Can.) 1868.

[18] c. 6 s. 2 S.A., 1906.

[19] Ibid., s. 3(c).

Authority to Prosecute Under the Criminal Code

By s. 91(27) of the Constitution Act, 1867, the Parliament of Canada was given exclusive jurisdiction over the "Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."[23] Ordinarily the Federal government would have jurisdiction to prosecute *Criminal Code* offences but, by s. 3(b) of *The Criminal Code* 1892,[24] Parliament defined the words "Attorney General" to mean "the Attorney General or Solicitor General of any province in Canada in which any proceedings are taken under this Act."[25] By virtue of that definition, the Attorney General of Alberta was given all of the prosecutorial authority and powers conferred upon an

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[20] Ibid., s. 3(a)(b)(d)(f)(g)(h).

[21] Ibid., s. 3(e).

[22] c. 6 s. 3(j) S.A., 1906. Since its passage in 1906, the authority and duties of the Attorney General of Alberta with respect to the supervision and prosecution of criminal offences(discussed *infra*) have remained unaltered. See The Department of The Attorney General Act, c. 6 S.A., 1906; c. 10 R.S.A., 1922; c. 9 R.S.A., 1942; c. 19 R.S.A., 1955; c. 95 R.S.A., 1970; c. D–13 R.S.A.,1980, c. D–13 S.A., as amended to May 16th, 1986. It is noteworthy that there were no provisions in the original Department of the Attorney General Act or any of the subsequent amendments to it which suggested or established a public prosecutions structure for the province.

[23] 30 & 31 Vict. c. 3 (U.K.) 1867.

[24] 55–56 Vict. c. 29 (Can.) 1892.

[25] Ibid., s. 3(b), this definition remained unaltered until amended for the first time by c. 38 s. 2(1) S.C. 1968–69.

Attorney General by the various provisions of the *Criminal Code*.[26] Hence, after 1906, the Attorney General's authority to prosecute *Criminal Code* offences in Alberta was derived from the provincial Attorney General Act in combination with the provisions of the federal *Criminal Code*.[27] His authority to prosecute was essentially unchanged from that of his federal predecessor prior to 1905.[28] As will be seen that was also true of the rights of private prosecutors.

B. Private Prosecutions In Alberta After 1905

Summary Conviction Proceedings: Equal Authority

In 1906, the *Criminal Code* [29] was consolidated and revised. Part XV of that *Code* dealt with summary conviction offences. According to s. 706(a) Part XV applied to all summary conviction proceedings taken under the Act, and s. 715(2), provided that the "complainant or informant" could prosecute personally or by counsel or agent appearing on their behalf.[30] As with the 1892 *Code*, the terms "prosecutor" "informant" and "complainant", while used interchangeably throughout Part XV, were not explicitly defined.[31] However it is beyond dispute that both private and public prosecutors in Alberta could initiate and prosecute summary conviction proceedings under the 1906 *Code*. There were few substantive changes to the criminal law until April of 1955 when the extensive revisions made to the *Criminal Code* in the year previous, were proclaimed into force.[32] With respect to the prosecution of summary conviction offences the rights of private prosecutors remained unchanged.[33] That state of affairs has never been changed in any of the subsequent amendments or revisions to the *Criminal Code*.[34] For that reason the remainder of this chapter will deal exclusively with the question of the authority of Crown agents and private prosecutors to prefer and prosecute indictable offences in Alberta.

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[26] See for example, the *Criminal Code*, c. 146 ss. 596–598, 873, 873A 1906 R.S.C. as amended. All the *Criminal Codes* after 1892 carried the same or a similar definition of Attorney General. The Attorney General's authority to prosecute *Criminal Code* offences in Alberta has not been enlarged from what it had been in 1906.

[27] It should be noted, however, that while Parliament delegated prosecutorial power to the provincial Attorneys General, it never delegated its exclusive authority to establish the *procedure* to be followed in prosecutions under the *Criminal Code*. See generally the procedural sections of *The Criminal Code* 1892 and subsequent amended *Codes* none of which delegate to the provincial Attorneys General the right to establish procedure in criminal prosecutions.

[28] See Chapter V *supra*.

[29] See c. 146 R.S.C. 1906 referred to hereafter as the *Criminal Code* 1906.

[30] Idem.

Private Prosecutions By Indictment, 1905–1955

A review of the early cases interpreting the provisions of the *Criminal Code* concerning private prosecution by indictment in Alberta and Saskatchewan shows that the provincial courts there seemed prepared to subordinate the rights of private prosecutors and to seemingly limit their prosecution rights to those instances in which the Attorney General had not intervened in some way.[35] These interpretations were made without any specific direction from parliament, not were there any provisions of the *Criminal Code* which required that result.[36]

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[31] The terms "prosecutor" and "informant" were not given statutory definition until 1954. See the *Criminal Code* c. 51, s. 692 S.C. 1953–54.

[32] c. 51 S.C. 1953–54 referred to hereafter as the 1954 *Code*.

[33] Any possible doubt which might have existed on this point were cleared up by the definitions of "informant" and "prosecutor" which were added to Part XXIV dealing with "Summary Convictions".These definitions were added by ss. 692(a) and (e) of the 1954 *Code*. The definitions made it quite clear that summary prosecutions by private prosecutors were both contemplated and unrestricted under Part XXIV. See *R. v. Schwerdt* (1958) 27 C.R. 35, 119 C.C.C. 81, and see Philip C. Stenning, *Appearing for the Crown*, (Cowansville, Quebec: Brown Legal Publications Inc., 1986) p. 264ff.

[34] See for example, the *Criminal Code* c. C–34, Part XXIV R.S.C. 1970 as amended which deals with summary conviction procedure. See particularly s. 720.

[35] See for example, *Maloney v. Fildes* [1933] 1 W.W.R. 33, (Alta.S.C.) where Ford, J. rather begrudgingly grants permission to a private prosecutor to prefer a charge even though proceedings were properly brought and the prosecutor was exercising the rights granted to him under the Criminal code. See also *R. Weiss* (1915) 23 C.C.C. 460 (Sask.S.C.) and *R. v. Edwards* [1919] 2 W.W.R. 600 (Alta.S.C.).

Authority to Prosecute

To understand the right of a private citizen in Alberta to prosecute by indictment after 1905, it is necessary to briefly reconsider four sections of the North West Territories Act of 1886.[37] It will be recalled that by sections 11 and 65 of that Act, the criminal law and procedure in criminal cases, as it existed in England on July 15th, 1870, was fully effective in the Territories.[38] Under either s. 66 or 67 of the Act, a private prosecutor could prefer a criminal charge and prosecute the matter through to conviction. Section 66 had provided for summary trials of certain indictable offences without the consent of the accused.[39] Section 67 provided for trial by jury on all other indictable offences not included in the absolute jurisdiction provisions of s. 66.[40] Section 67 not only provided for trial by jury, but also allowed the accused the option to be tried summarily by a superior court judge sitting alone.[41] Sections 66 and 67 remained in effect even after Alberta and Saskatchewan were established as provinces in 1905.[42]

Prior to the *Criminal Code* amendments of 1907, the only way to prefer an indictment in Alberta, whether one was the Attorney General or a private citizen was to first obtain the permission of the superior court before which the charge was to proceed. This was because there was no grand jury in the North West Territories before 1905 or in Alberta after that date.[43] Thus under the provisions of the 1892 *Code* (and prior to its amendment in 1907), the legal position of a private prosecutor, and that of the Attorney General of Alberta, were the same when prosecuting indictable offences.

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[36] See Stenning, *Appearing for the Crown*, *supra* n. 25 at p. 150ff.

[37] c. 50 R.S.C. 1886.

[38] Provided that the English law or procedure was not inconsistent with Canadian legislation.

[39] The North West Territories Act c. 50 R.S.C. 1886.

[40] Idem.

[41] Ibid. As a result of this section, Part LIV of the 1892 *Code* which dealt with Speedy Trials (see s. 762) did not apply in the North West Territories. See "The Alberta Exception," *infra.*

[42] See The Alberta Act 4–5 Ed. VII c. 3 s. 2(16) (Can.) 1905. The authority of a private prosecutor to prosecute indictable offences was given added strength by s. 675 of the 1892 *Code* which, among other things incorporated the English law, procedure and practice concerning jury trials, into the *Criminal Code.*

The Criminal Code Amendments of 1906-1907

In 1906 and 1907, two changes were made to the *Criminal Code* to clear up the procedural confusion which existed in Alberta and Saskatchewan because of the continued applicability of the North West Territories Act. The first amendment, which appeared as s. 9 in the *Criminal Code* 1906, said that the provisions of the *Code* applied in Saskatchewan[44] and Alberta[45] *except* where they were inconsistent with the North West Territories Act, 1886.[46] The second amendment, s. 873A,[47] established the procedure, in the absence of a grand jury, for preferring a charge for an indictable offence in Alberta and Saskatchewan under s. 67 of the North West Territories Act.

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[43] See Chapter V *supra* .

[44] See 55–56 Vict. c. 29 s. 983 (Can.) 1907. This section was repealed as to Saskatchewan in 1927, see the *Criminal Code* c. 146 s. 9 R.S.C. 1927.

[45] This section remained in the *Criminal Code* and continued to apply to Alberta until 1946 when it was repealed and replaced with s. 581A, discussed below.

[46] As amended to September 1st, 1905. See *R. v. Barrs* (1946) 86 C.C.C. 9, 12 (Alta.C.A.) where, Harvey, C.J.A., speaking for the Court, held that s. 9 of the *Criminal Code* makes it "abundantly clear that the old North West Territories Act constitutes the law in Alberta as respects criminal procedure to the extent that they differ from the provisions of the *Criminal Code* and that where they do not differ, the provisions of the *Criminal Code* apply.", p. 12.

[47] Added by the Criminal Code Amendment Act, 6–7 Ed. VII c. 8, s. 2 (Can.) 1907. Section 873A was a reenactment of the North West Territories Amendment Act, 1891 54–55 Vict. c. 22 s. 11 (Can.), s. 873A stated:

> In the provinces of Saskatchewan and Alberta it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.
> 2. Such a charge may be preferred by the Attorney–General or an agent of the Attorney–General, or by any person with the written consent of the judge of the court or of the Attorney–General, or by order of the court.

By the terms of s. 873A, a charge could be preferred directly before the court with trial jurisdiction[48] in any one of the following ways:[49]

1. by the Attorney General or his agent,
2. by any person with the written consent of the Attorney General,
3. by any person with the written consent of a judge of the court, or
4. by order of the court.[50]

Formal indictment was not required under s. 873A, and a private prosecutor could commence proceedings simply by preparing a charge in writing setting forth the allegations and then preferring the charge directly before the trial court using one of the above mentioned procedures.[51]

Private Prosecutions Under Section 873A

Clearly under s. 873A, private prosecutors had concurrent jurisdiction with the Attorney General to initiate and prosecute indictable offences in Alberta.[52] In *Re: The*

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[48] The *Criminal Code* 55–56 Vict. c. 146 s. 873A(1) R.S.C. 1906, as amended.

[49] Ibid., s. 873A(2).

[50] Idem.

[51] Ibid., and see *Re: The Criminal Code* [1910] 43 S.C.R. 434, 16 C.C.C. 459, 479 (S.C.C.). The procedure to prefer a charge under s. 873A in Alberta remained unaltered, until 1985, although the section was renumbered in subsequent revisions of the *Criminal Code*. See s. 507 of the *Criminal Code* c. C–34 R.S.C. 1970.

[52] Although of course the Attorney General could directly prefer an indictment on his own authority which a private prosecutor could not do. As well, the Attorney General had general supervisory powers over all criminal prosecutions once commenced, and could enter a stay of proceedings, if in his opinion that was required. Ibid., s. 962.

Criminal Code,[53] it was held that in the absence of *Criminal Code* provisions, the right to prefer an indictable charge in Alberta was unqualified.[54] In his judgement, Mr.Justice Anglin said that because there was no grand jury in Alberta or Saskatchewan,[55] the Canadian Parliament had to find a way for charges to be preferred in those provinces and s. 873A was the result. Hence, in Alberta, s. 873A replaced the grand jury indictment procedure set out in s. 873[56] which was still in use in the other provinces. It will be recalled that at common law anyone could appear before the grand jury to prefer an indictment, a preliminary inquiry was not required, and the grand jury could issue an indictment based entirely upon its own knowledge and findings.

Mr Justice Anglin also found that a charge preferred under s. 873A was in substitution of the indictment found by a grand jury. Thus, in the absence of detailed procedural guidelines in the *Criminal Code*, the procedure and rights of preferring a charge under s. 873A were the same as those under s. 873.[57] Therefore, in the view of Mr. Justice Anglin, concurred in by the whole court, this meant there was no requirement that a preliminary inquiry be held prior to a charge being preferred under s. 873A.[58] Thus in Alberta , there was no requirement for a preliminary inquiry under the provisions of s. 873 A. Hence, according to the clear wording of s. 873A and the reasoning of several decisions on point,[59] a private prosecutor, subject only to the requirement of obtaining consent, had unimpaired rights to prosecute indictable offences .[60]

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[53] [1910] 43 S.C.R. 434, 16 C.C.C. 459, (all citations are to the report in the *Canadian Criminal Cases)*.

[54] Ibid., p. 477.

[55] See the North West Territories Act 1886 c. 50 s. 65.

[56] Anglin J., *Re: The Criminal Code* 16 C.C.C. 459, 478.

[57] Ibid., and see *R. v. Edwards* [1919] 2 W.W.R. 600 (Alta.S.C.), and *R. v. Duff* (No. 2) 15 C.C.C 454 (Sask.C.A.).

[58] Ibid. Mr. Justice Anglin reasoned, that since a preliminary inquiry was not a requirement under s. 873 of the *Criminal Code* 1906, (the grand jury procedure) none should be required under s. 873A. But see *R. v. Duff* (No. 2) 15 C.C.C. 454 (Sask.C.A.) which held that in Saskatchewan, a preliminary inquiry was required prior to a charge being preferred under s. 873A.

The Alberta Exception

By s. 66 of the North West Territories Act, which continued to apply in Alberta until 1929, a wide range of criminal offences were placed within the absolute trial jurisdiction of a Superior court judge sitting without a jury.[61] An accused charged with an offence included in s. 66 had no choice except to be tried in a summary way by a Judge without a jury.[62] This situation was thought to be unfair and in 1930 the Canadian Parliament passed the Criminal Procedure In Alberta Act.[63] That Act did two things; first, it confirmed the 1929 repeal of s. 66 of the North West Territories Act, 1886;[64] second, it amended s. 67 of that Act so that in Alberta, *all* persons charged with indictable offences were to be tried by a judge and jury; but, at the election of the accused, he or she could choose to be tried by a judge sitting alone.[65]

Thus, after 1930, all offences to be tried by indictment, were, from the moment the decision was taken to proceed in that fashion, subject to the procedure in a jury trial. This of course included the preferring of a charge which in Alberta, was governed by s. 873 (5) and (6) (formerly s. 873A) of the *Criminal Code*.[66] Only in Alberta were the rights of a private prosecutor fully preserved in trials by indictment—both by the provisions of the *Code* and by the applicable provisions of the North West Territories Act.[67]

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[59] *Re: The Criminal Code* 16 C.C.C. 459, *R. v. Edwards* [1919] 2 W.W.R. 600 (Alta.S.C.), and *R. v. Duff* (No. 2) 15 C.C.C 454 (Sask.C.A.).

[60] The provisions of s. 873A remained in the *Criminal Code* until Dec. 4th, 1985 when they were replaced by ss. 504 and 507 pursuant to the provisions of the The Criminal Law Amendment Act, 1985 c. 19, ss. 113 and 115. These new sections abolished the grand jury in Canada and substantially re–enacted the provisions of s. 873A as the procedure for preferring indictments for use in all provinces and territories in Canada.

[61] By Order–in–Council made May 29th, 1929, s. 66 of the North West Territories Act c. 50 R.S.C. 1886, was repealed. See Can. Gazette v. 62 p. 4342.

[62] s. 66 North West Territories Act c. 50 R.S.C. 1886.

[63] 20–21 Geo. V c. 12 (Can.) 1930.

[64] Ibid., s. 1.

[65] Ibid., s.2(1). These changes made Alberta unique among all the provinces and territories of Canada, as they only applied to Alberta. *See R. v. Bercov* (1950) 96 C.C.C. 168, 173 (Alta.C.A.) where Alberta is described as being unique in this regard.

The Criminal Code Amendment Act, 1946

Prior to the major revision of the *Criminal Code* in 1954, there was in 1946, one further amendment which touched upon private prosecutions of indictable offences in Alberta. By this amendment, s. 9(c) of the 1927 *Code* was repealed[68] and s. 581A was added in its place.[69] It will be recalled that s. 9(c) had provided that in Alberta, the

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[66] s. 873A, 6–7 Ed. VII, c. 8 (Can.) 1907 was re–enacted several times. First by s. 873(5)(6) in the *Criminal Code* c. 146 R.S.C. 1927, then by s. 489 in the 1954 *Code*, again by s. 507 in the 1970 revisions to the *Criminal Code*, and most recently by ss. 504 and 507 of the Criminal Law Amendment Act 1985 c. 19, ss. 113, 115.

[67] By virtue of ss. 66 and 67 of the North West Territories Act 1886 as amended, Alberta always had its own "Speedy Trial" provisions. The Speedy Trial provisions of 32 & 33 Vict. c. 32 (Can.) 1869 were never made applicable to the North West Territories prior to 1905. The "Speedy Trial" provisions of Part LIV of the 1892 *Code* were by virtue of s. 762 not applicable to the Territories prior to 1905 or to Alberta after that date. The Speedy Trials provisions of the 1906 and 1927 *Criminal Codes* were made subject to the provisions of the North West Territories Act c. 50 R.S.C. 1886 as amended, see the *Criminal Code* c. 146 s. 822 R.S.C. 1927. Thus, cases from outside Alberta which, under the Speedy Trial provisions of the *Criminal Code*, purport to restrict the rights of a private prosecutor, must be read subject to the unique position of private prosecutors in Alberta. See *R. v. Bercov* (1950) 96 C.C.C. 168 (Alta.C.A.) where Harvey, C.J.A. at p. 178 says there is no analogy to be found in cases from outside Alberta argued under the Speedy Trial provisions of the 1927 *Code*. It is noteworthy that between 1905 and 1930, when the above discussed changes concerning private prosecutors in Alberta were made, no comparable steps were taken to erect a provincial prosecutions scheme bases on local Crown Attorneys. Public prosecutorial authority continued to be vested in the Attorney General of Alberta alone. Aside from the Department of the Attorney General Act, discussed *supra*, no other provincial legislation dealing with public prosecution of criminal offences was enacted. However, in the matter of the preferment of charges the Attorney General's authority was shared concurrently with the judges of the superior courts of the province. In this regard see *R. v. Powell* [1938] 1 W.W.R. 347 (Alta.C.A.) which held that following a preliminary inquiry, a judge with jurisdiction, having read the depositions taken at the inquiry, had a duty and not merely a right to allow a private prosecutor to prefer a charge, where a prima facie case was established. See also *R. v. Weiss* (1915) 7 W.W.R. 1160, 23 C.C.C. 460 (Sask.S.C.).

[68] 10 Geo. VI c. 20 (Can.) 1946, s. 1.

[69] Ibid., s. 2. Section 581A stated: Notwithstanding anything in this Act, an accused who is charged with (con't)

Criminal Code did not apply wherever it was inconsistent with the North West Territories Act as amended prior to September 1st, 1905. Although s. 581A made no reference to the North West Territories Act, nevertheless its effect was to place the substance of s. 67 of that Act into the *Criminal Code*.[70] Section 581A provided that notwithstanding any other provisions of the *Criminal Code*, any person charged with an indictable offence in Alberta, "may with his own consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without the intervention of a jury."[71] Although s. 9(c) was dropped from the *Code*, in practice it was never required except to avoid confusion.[72]

Private Prosecutions for Indictable Offences After 1955

While many revisions were made in the 1954 *Code*, the procedure to prosecute indictable offences in Alberta was changed very little. Under s. 439(1), anyone, upon proper grounds, could initiate criminal proceedings for an indictable offence and could appear at the preliminary inquiry to prosecute personally or through counsel.[73] Section 7 of the *Code*, retained in Alberta, the applicable criminal law and procedure of England (the effective date of which was July 15th 1870).[74] According to Stephen, in England in 1870, "every private person had exactly the same right to institute any criminal prosecution as the

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an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury.

[70] See the discussion of s. 67 *supra*.

[71] 10 Geo VI c. 20 s. 2 (Can.) 1946. This section was repeated in the *Criminal Code* c. 51, S.C. 1953–54 as s. 417, and in the *Criminal Code* consolidation of 1970, c. C–34, R.S.C. 1970, as s. 430.

[72] By s. 16(1) of the Alberta Act, 4–5 Ed. VII c. 3 (Can) 1905, all of the relevant provisions of the North West Territories Act, as amended and which have been referred to above were continued in force in the province. These remained in the North West Territories Act until their repeal in 1955. See The North West Territories Act c. 195 ss. 47 and 50, R.S.C. 1952. Sections 47 and 50 were repealed by the North West Territories Act, c. 331 R.S.C. 1952 which came into force on April 1st, 1955 to coincide with the effective date of the *Criminal Code* c. 51 S.C. 1953–54.

[73] See *R. v. Schwerdt* (1958) 27 C.R. 35, 119 C.C.C. 81.

[74] See J.E. Cote, "The Introduction of English Law Into Alberta" (1964) 3 *Alberta Law Review* p. 270ff.

Attorney General or anyone else."[75] With few exceptions, that was also the law in Alberta.[76]

The Alberta Exception is Continued

In 1954, s. 415 was added to the *Code*. This stated that unless "otherwise expressly provided by law, every person charged with an indictable offence shall be tried by a court composed of a judge and jury."[77] Section 417 of the *Code* (formerly s. 581A)[78] said that notwithstanding anything in the Act, an accused charged with an indictable offence in Alberta, may with his consent be tried by a superior court judge sitting without a jury. The combination of sections 415 and 417 meant that in Alberta, trial by jury was mandatory unless the accused chose otherwise by consenting to a trial by a judge alone.[79] In that respect Alberta continued to be unique because *all* trials on indictment, whether by judge and jury or judge without jury, were procedurally jury trials.[80] Section 417 had, in Alberta, replaced the provisions of Part XVI of the 1954 *Code* which in all other Canadian jurisdictions contained the procedure for trials on indictment by a judge without a jury.[81]

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[75] See James F. Stephen, *A History of the Criminal Law of England*, (Vol. 1) (New York: Burt Franklin Publishing, 1964) p. 485.

[76] A private prosecutor's rights in Alberta were of course subject to the limitations of the *Criminal Code* such as the need to obtain consent to prosecute certain offences, (see ss. 54, 82, 100, 229, and 420 of the 1954 *Code*) and the common law right of the Attorney General to supervise criminal prosecutions within the province. See s. 490 which provided for entry of a stay of proceedings on prosecutions by indictment.

[77] The 1954 *Code* c. 51 s. 415 S.C. 1953–54.

[78] S. 581A was added to the *Criminal Code* 1927 in 1946 by s. 2 c. 20, 10 Geo. VI (Can.) in replacement of s. 9(c) of the 1927 *Code* which was repealed.

[79] See *R. v. Bobyk* (1962) 40 W.W.R. 186 (Alta.C.A.), *R. v. Speidel* [1930] 1 W.W.R. 423,.(Alta C.A.), *R.v. Barrs* (1946) 86 C.C.C. 9, (Alta C.A.) and *R. v. Bercov* (1950) 96 C.C.C. 168, (Alta C.A.). In *Bercov*, Harvey, C.J.A. said s. 581A (which became s. 417 of the 1954 *Code*), did not incorporate the "speedy trial" provisions of the 1927 *Code* which became the "Trial by Judge Without Jury" sections of Part XVI of the 1954 *Code*.

[80] Idem.

[81] Ibid., p. 417; Smith, C.J.A. points out that the Judge without Jury trial provisions of Part XVI were (con't)

According to Smith, C.J.A.,[82] the normal practice in Alberta when dealing with an indictable offence was that *after* a committal for trial and at the time of arraignment on the charge, the following statement was put to the accused;

> Upon this charge, it is provided that the charge shall be tried by a judge with the intervention of a jury of six, but you may, with your own consent, be tried by a judge in a summary way without the intervention of a jury. Which do you elect.[83]

Clearly, the charge had already been preferred and a preliminary inquiry completed, but the accused had not yet elected how he wished to be tried. That was not the procedure set out in Part XVI of the 1954 *Code* which governed trials by a judge without a jury in the rest of Canada.[84]

The significance of all of this lies in the fact that whereas in Alberta a private prosecutor had the same rights to prosecute on indictment as did a Crown prosecutor, outside of the province that was not the case. In other provinces, from the moment an accused elected to be tried by a judge without a jury under the speedy trial provisions of Part XVI, a private prosecutor's rights to conduct the prosecution or prefer the indictment were greatly diminished.[85] Under that Part, jury trial procedure did not apply. Section

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superseded by the 1946 amendment which introduced s. 581A into the 1927 *Code*. That section was retained in the *Code* as s. 417.

[82] Ibid., p. 187.

[83] Idem.

[84] See s. 467, 468 of the 1954 *Code*.

[85] See Fred Kaufman, "The Role of the Private Prosecutor: a critical analysis of the complainant's position in criminal cases" (1960-61) 7 *McGill Law Journal*, 102-114, and Peter Burns, "Private Prosecutions In Canada: The Law and a Proposal For Change" (1975) 21 *McGill Law Journal*, 267-269. Each of these authors carefully consider the prosecutorial authority of private prosecutors under the *Criminal Code*. Kaufman argued that in a trial by a judge without a jury, private prosecutors had no standing and could not prosecute (pp 113–114). Burns, writing fifteen years later, came to the opposite conclusion (see particularly p. 279). His view is supported by the decision in *R v. Schwerdt* (1957) 27 C.R. 35 and is the preferable of the two. It is noteworthy that neither article discusses the unique position of private prosecutors in Alberta a fact also missed in Stenning, *Appearing for the Crown*, *supra* n. 25; see particularly Chapter 12, "Private Prosecutors And The Police", p. 263ff.

478(1) of Part XVI specified that prosecutions were to be conducted by the Attorney General, his agent, "or by any person who has the written consent of the Attorney General."[86] This was in contrast to Alberta where s. 489 in Part XVII—the jury trial procedure—applied to the preferment and prosecution of all indictable offences, and where the Attorney General or his agents did not have exclusive control over the preferment of indictments.[87]

The 1968–69 Amendment to Section 489 of the Criminal Code

In 1969, an amendment was made to s. 489.[88] Since its first introduction in 1907 as s. 873A, there had been no modification to its wording or to its *effect* upon the rights of those preferring indictments under its provisions until the 1969 amendment.[89]

Prior to 1969, a private prosecutor in Alberta who preferred an indictment under s.

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[86] s. 478(1) stated;

> Where an accused elects, under section 450, 468 or 475, to be tried by a judge without a jury, an indictment in Form 4 shall be preferred by the Attorney General or his agent, or by the Deputy Attorney General, or by any person who has the written consent of the Attorney General, and in the province of British Columbia may be preferred by the clerk of the peace.

[87] s. 489 provided as follows;

> (1) In the provinces of Quebec, Manitoba, Saskatchewan, Alberta and British Columbia and in the Yukon Territory and Northwest Territories it is not necessary to prefer a bill of indictment before a grand jury, but it is sufficient if the trial of an accused is commenced by an indictment in writing setting forth the offence with which he is charged.
> (2) An indictment under subsection (1) may be preferred by the Attorney General or his agent, by the Deputy Attorney General, or by any person with the written consent of a judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.

[88] The Criminal Law Amendment Act s. 45 c. 38 S.C. 1968–69; s. 489 was the section which determined the procedure to prefer an indictment in Alberta (as well as all other provinces without grand juries). It will be recalled that that section was first introduced in 1907 as section 873A. In the 1927 *Code*, section 873A was renumbered and became section 873(5) (6). Sub-sections 873(5) and (6) were preserved without modification but were renumbered as section 489(1) and (2) in the 1954 *Code*. The amendment, which became s. 489(3), stated;

> (3) Notwithstanding anything in this section, where (a) a preliminary inquiry has not been held, or (b) a preliminary inquiry has been held and the accused has been discharged, an indictment under subsection (1) shall not be preferred except with the written consent of a judge of the court, or by the Attorney General.

[89] The effect of the amendment was thoroughly considered in *R. v. McKibbon* (1984) 10 C.C.C. (3d) 193—see the judgement of Lamar J., speaking for the majority at p. 225.

489(2)[90] was granted the unqualified right "to indict for any offence irrespective of a preliminary hearing being held or the result thereof."[91] The 1969 amendment[92] reflected the importance Parliament placed upon the need for a preliminary inquiry into a criminal charge and a committal to stand trial, prior to an indictment being preferred. The result of the amendment in all non–grand jury provinces (which included Alberta) was to restrict the right of a prosecutor to prefer an indictment under certain circumstances. Under the new scheme only the Attorney General or anyone with the written consent of a judge of the superior court could prefer an indictment where a preliminary inquiry had not first been held, or if it had, where the accused had been discharged following the inquiry.[93]

Otherwise a prosecutor proceeding under s. 489(2),[94] could prefer an indictment if, (a) a preliminary inquiry was held and the accused was committed for trial on at least one of the charges at the inquiry, or (b) the count to be preferred was one on which the accused was committed for trial, or was for an offence disclosed in the evidence at the inquiry and was not part of a charge on which the accused had been discharged.[95] A two level scheme was thus established. Where an inquiry had been held and a committal obtained, the preferring of the indictment was to be routinely completed under s. 489(2) by a private or public prosecutor. However, if a preliminary inquiry was not held, or was held and the accused discharged, then a prosecutor would have to convince the Attorney General or a superior court judge to allow the preferment of a direct indictment. This provision was intended to place a check on indictable prosecutions where the merits of the charge had not first been examined by a magistrate at a preliminary inquiry.[96]

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[90] Section 489(2) of the 1954 *Code* said: "An indictment under subsection (1) may be preferred by the Attorney General or his agent, by the Deputy Attorney general, or by any person with the written consent of a judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.

[91] *Re McKibbon* (1984) 10 C.C.C. (3d) 192 at p. 225. Lamar, J. was restating the conclusion reached by the earlier Supreme Court of Canada decision in *Re: The Criminal Code* [1910] 43 S.C.R. 434, 16 C.C.C. 459.

[92] s. 45 c. 38 S.C. 1968–69

[93] *Re McKibbon*, (1984) 10 C.C.C. (3d) 192 at p. 226.

[94] By s. 489(2) prosecutors were defined as including the Attorney General or his agent, or any person with the written consent of a judge or of the Attorney General or by order of the court.

[95] *Re McKibbon*, (1984) 10 C.C.C. (3d) 192 at p. 226.

From the time of its inception as a province there has been nothing in the provisions of the *Criminal Code* which, in Alberta, restricted the right of private prosecutions for *Criminal Code* offences. By law, the rights of the private prosecutor to proceed by indictment co–existed along side those of the Attorney General, although of course, the latter had extensive powers concerning the supervision of criminal prosecutions which the former did not have. The remaining question then, concerns the authority of the local Crown prosecutor to prosecute by indictment on behalf of the Attorney General.

C Criminal Code Prosecutions By Agents Of The Attorney General in Alberta

Prior to 1907 there was only one means whereby a charge for an indictable offence could be preferred and prosecuted in Alberta. That was to obtain the permission of the trial court before which the indictment was to be preferred.[97] This requirement applied to the Attorney General and private prosecutor alike. As described above,[98] in 1907, Parliament amended the *Criminal Code* by adding s. 873A which established the procedure to be followed when preferring indictable charges in Alberta and Saskatchewan.[99] That section was as follows:

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[96] Ibid. See generally the judgement by Lamar, J. See also *R. v. Hull* (1982) 20 Alta L.R. (2d) 333 (Q.B.) where the procedure to be followed under s. 489(3) was described by Stratton, J. as being extraordinary and was to be invoked only were necessary to prevent a miscarriage of justice.

[97] *The Criminal Code 1892*, 55–56 Vict. c. 29 s. 641.

[98] See "The Criminal Code Amendments of 1906–1907" *supra.*

[99] 6–7 Ed. VII c. 8 (Can.) 1907. The effect of this amendment was fully explored by the Supreme Court of Canada in its judgement in *Re The Criminal Code* [1910] 43 S.C.R. 434, 16 C.C.C. 459.

> In the provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.
>
> 2. Such a charge may be preferred by the Attorney–General, or an agent of the Attorney General, or by any person with the written consent of the judge of the court or of the Attorney–General, or by order of the court.

Agents of the Attorney General

While s. 873A spoke of an "agent of the Attorney General" it did not define what that phrase meant or the nature of the agency involved.[100] Because of the silence of the *Criminal Code* these questions became the subject of judicial attention in a series of decisions concerned with the authority of an agent of the Attorney General, and how that authority was to be conferred upon the agent by the responsible Attorney General.

The Supreme Court of Canada first considered these issues in *Abrahams v. The Queen*.[101] In his judgement, Ritchie C.J.C., held that the Attorney General could not delegate to the judgement and discretion of another, the power which the legislature had given the Attorney General personally to exercise in preferring an indictment.[102] Mr. Justice Henry added that there was no authority under the statute for the Attorney General to delegate his powers.[103] Counsel who only had general instructions to conduct the Crown's business in a particular court had no authority to prefer indictments in particular cases.[104] Such counsel required specific instructions from the Attorney General, for each case concerned.[105]

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[100] Nor was "agent of the Attorney General" defined elsewhere in the *Criminal Code* of 1906 or in any of its successor consolidations or replacements. It will also be observed that the right of private prosecution was fully preserved under the provisions of s. 873A.

[101] [1882] 6 S.C.R. 10, 16.

[102] Idem.

Of similar result were two later judgements of the Appellate Division of the Supreme court of Nova Scotia which considered the effect of s. 641 of the 1892 *Code*.[106]

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[103] The Supreme Court was considering the effect of The Criminal Trial Procedure Act 32 & 33 Vict. c. 29 s. 28 which was a predecessor of s. 873A—the amendment made to the *Criminal Code* in 1907.

[104] *Abrahams v. The Queen* [1882] 6 S.C.R. 10, 17.

[105] Idem.

[106] This was the immediate predecessor of s. 873A. Section 641 of the 1892 *Code* stated the following:

> Anyone who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.
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> 2. The Attorney-General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

At common law anyone could appear before the grand jury to prefer an indictment. A preliminary inquiry was not required and the grand jury could issue an indictment based entirely upon its own knowledge and findings. As the grand jury proceedings were held *in camera* it was quite possible for someone to appear before the grand jury, make out a case against another and have an indictment issued without the accused having the first idea proceedings had been taken against him until he was arrested or served with a summons to appear at his trial. Section 641 of the 1907 *Code* was enacted to prevent the obvious abuses which might occur if the common law grand jury procedure were not altered. See the remarks of Lamer J. in *R. v. McKibbon*, (1984) 38 C.R. (3d) 305 at 326–327 (S.C.C.). Following its passage, and subject to the exceptions in sub-section (2), no person was liable to be indicted without a preliminary inquiry first being held. As well, the grand jury were not "at liberty to find a bill [of indictment] upon their own knowledge only; and the right to go directly before them and prefer a bill against anyone is taken away". It was still possible to prefer an indictment directly, pursuant to sub-section (2), but any such indictments would obviously undergo careful consideration and scrutiny before the required consents were given. The 1907 *Code* remained silent concerning the common law authority of the Attorney General to prosecute by way of an *ex officio* or "criminal" information as it was commonly called. That remedy was only available for misdemeanours (see Chapter III, "The Attorney Generals Prerogative Powers, The *Ex Officio* Information" *supra*). Section 535 of the 1907 *Code* abolished the distinction between felonies and misdemeanours and after that time it would have been very difficult for an Attorney General to prosecute a criminal offence by way of an *ex officio* information. It appears that although *ex officio* informations were used in Upper (con't)

In *R. v. Townsend* the Court held that where an indictment is preferred solely upon the strength of a direction from the Attorney General, such direction must be in writing and must be specific to each *particular* case.[107] A general written direction, from the Attorney General, to counsel acting for the Crown, to prefer indictments and conduct the trials of criminals at the sittings of a criminal court would not be sufficient.[108] Three years later, in *R. v. Hamilton*, the court made a further ruling concerning the authority of agents of the Attorney General to prefer indictments pursuant to s. 641.[109] The issue in *Hamilton* was whether agents, acting under a general appointment to conduct the criminal business at Court, but without having specific directions from the Attorney General, or the consent of the judge as required by s. 641 of the 1892 *Code*, could prefer an indictment in the absence of the private prosecutor who was bound over to prosecute the case.[110] The answer was that they could not. The mere fact that the Attorney General, under provincial legislation, may appoint counsel to attend to all cases at a criminal court was not sufficient to comply with the specific requirements of the *Criminal Code*.[111]

In 1910, in *Re: The Criminal Code* [112] the Supreme Court of Canada approved the judgements in *Abrahams*, *Townsend*, and *Hamilton* and applied them directly when interpreting the meaning of the recently added s. 873A of the *Criminal Code*. The court

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Canada, this practice died out after the 1820's. See Stenning, *Appearing for the Crown*, *supra* n. 25 at pp. 41, 51 and 139. *Ex officio* informations were abolished in Canada in the 1954 *Criminal Code* , 1953–54, c. 51, s. 488, now s. 506, R.S.C. 1970, c. C–34 as amended. See also 6–7 Ed. VII c. 8 (Can) 1907, and see the judgement of the Supreme Court of Canada in *Re: The Criminal Code*, [1910] 43 S.C.R. 434, 16 C.C.C. 459.

[107] (1896) 3 C.C.C. 29 (N.S. S.C.App.Div.).

[108] Idem.

[109] (1899) 2 C.C.C. 178 (N.S. S.C.App.Div.).

[110] Ibid., pp. 184–187.

[111] Idem.

[112] [1910] 43 S.C.R. 434, 16 C.C.C. 459. All page references are to the report in the *Canadian Criminal Cases*.

held that the authority of the Attorney General when preferring a charge under the provisions of s. 873A is both statutory and quasi–judicial.[113] Action by him is substituted for that of the grand jury under s. 873.[114] Citing the above three cases Anglin J. states: "it is well established that such statutory powers and duties can be delegated *only under* and in *strict conformity* with statutory authority."[115]

Mr. Justice Anglin pointed out that agents of the Attorney General of Canada were well known in the North West Territories prior to 1905 and these were replaced by agents of the provincial Attorneys General after Alberta and Saskatchewan were established as provinces.[116] "These agents have no general authority to act for the Attorney General. They carry out specific instructions given in particular cases."[117] The Supreme Court also held that the Deputy Attorney General was *not* an agent of the Attorney General for the purposes of s. 873A.[118] The fact that two means of delegation of authority are specified in the section, was "in itself a cogent argument that Parliament did not intend that any other delegation should be permitted."[119] The quasi–judicial power which by s. 873A was conferred upon the Attorney General of Alberta was "so personal and so discretionary — that nothing but specific legislation unmistakably applicable can justify its delegation."[120]

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[113] Ibid., see the decision of Anglin J., p. 479, and see n. 47 *supra* for the text of s. 873 A.

[114] Ibid., Anglin J. refers to the preferment procedure before a grand jury which was set out in s. 873 of the 1906 *Code*.

[115] Ibid., p. 480, emphasis added.

[116] Idem.

[117] Idem. When s. 873A was added to the *Criminal Code* in 1907, the words "or his agent" were used in place of the words "or anyone by his direction" which were the ones used in s. 873, the section which governed the preferment of indictments in those provinces with grand juries. That it was not the intention of Parliament to confer upon these "agents" of the Attorney General, a general authority to prosecute on his behalf is made clear by Mr. Justice Anglin's remarks. It was not the practice of Attorneys General to confer a general delegation of authority on their agents as was made clear in *Rex v. Weiss* (1915) 23 C.C.C. 460, 462 (Sask.S.C.). In that case Chief Justice Hamilton described the preferment procedure of the time in Saskatchewan. Following the preliminary inquiry and committal, the depositions were sent to the clerk of the District Court. Upon receipt, the clerk sent the materials to the local agent of the Attorney General who reviewed them sending copies together with his comments to the Attorney General. The Attorney General, pursuant to s. 873A(2), then either specifically authorized the local agent to prefer charges or not as he, the Attorney General, determined.

[118] *Re: The Criminal Code, supra*, p. 480; see also *R. v. Duff* (No. 2) 15 C.C.C. 454 (Sask.S.C.App.Div.). See n. 47 *supra* for the text of s. 873 A.

The Supreme Court's decision in *Re: The Criminal Code*,[121] remained the law in Alberta until 1969 when an amendment was made to s.873A (renumbered as s.489).[122] Thus, in Alberta, and until 1969, while the Attorney General had an unlimited statutory and common law discretion to prefer indictments, his lawful agent had no greater authority to do so than did a private prosecutor. Under the provisions of s. 873A each had to have specific authorization from either the Attorney General, a Judge of the court, or by order of the court before they could prefer or proceed with a prosecution on indictment.

Prosecutions by Crown Prosecutors After 1969

In Alberta, as in most other provinces, full time agents of the Attorney General who are instructed to conduct prosecutions on his behalf, are generally referred to as Crown prosecutors. The authority of these agents to prosecute on behalf of the Attorney General remained as it was under the 1907 *Code* until changed in 1969.[123]

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[119] Ibid., p. 480.

[120] Ibid., p. 481.

[121] [1910] 43 S.C.R. 434, 16 C.C.C. 459.

[122] See "The 1968–69 Amendment to Section 489 of the Criminal Code" *supra*. Section 489 which replaced s. 873A added the Deputy Attorney General as being one of the persons who could prefer an indictment but it gave the Deputy no authority to use an agent or to authorize anyone else to prefer an indictment. Section 873A was first renumbered as s. 873(5) and (6) of the 1927 *Code*, c. 36 R.S.C. 1927.

[123] The sixth edition of *Tremeear's Annotated Criminal Code*, published in 1964—Leonard J. Ryan, (ed) (Toronto: Carswell's, 1964),at p. 840—cited both *R. v. Townsend* (1896) 3 C.C.C. 29 (N.S. C.A.),and *Abrahams v. R.*,(1881) 6 S.C.R. 10 (S.C.C.), as authority for the rule that agents of the Attorney General must have specific consent from the Attorney General for each particular case, before such agents could purport to prefer indictments on his behalf. Under the terms of the Department of the Attorney General Act, 1955, c. 19 R.S.A., the Attorney General had the same powers to administer the law and prosecute criminal offences as had originally been provided in 1906, (c. 6 S.A.). His authority to prosecute criminal (con't)

The 1969 amendment to s. 489 of the *Code* altered the procedure by which indictments could be preferred in Canada.[124] Following its introduction there was initially some confusion as to what it meant and what the authority of a Crown prosecutor was, when acting under its provisions.[125] As to its meaning one thing was certain the amended section did not provide authorization for a Crown Prosecutor to act on his own authority.

In *Alward* [126] the New Brunswick Court of Appeal held that the more reasonable view of the section was that the Attorney General may act through an agent, but the agent must be *specifically* instructed to prefer an indictment in the *particular* case concerned. Under s. 489(3), where a preliminary inquiry had not been held a Crown prosecutor was in no better position than a private one and could not prefer an indictment charging the accused with an offence unless the prosecutor had first obtained the written consent of a judge of a superior court, or had the specific direction of the Attorney General to prefer an indictment for that particular case.[127]

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offences under the *Criminal Code* of 1954 remained essentially as they were under the original *Criminal Code* of 1892. The term "Attorney General" was defined by s. 2(2) of the 1954 *Code* which stated;

> "Attorney General" means the Attorney General...of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Northwest Territories and the Yukon Territory, the Attorney General of Canada.

The Attorney General's powers to stay proceedings, institute appeals and prefer indictments were unchanged from what they had been under previous *Codes*. With respect to preferring indictments in Alberta, the Attorney General continued to share concurrent jurisdiction with the Courts (see s. 489 of the 1954 *Code*). By section 489(2) of the *Code*, he was empowered to authorize agents to prefer indictments on his behalf. He was given authority to hire such agents, both part time and full time, by s. 3(j) (viii) of The Department of The Attorney General Act c. 19 R.S.A. 1955, (now s. 2 (j) (vii), c. D–13 R.S.A. 1980 as amended).

[124] See "The 1968–69 Amendment to Section 489 Of the Criminal Code" *supra*. The effects of this amendment were thoroughly discussed in *Re McKibbon* (1984) 10 C.C.C. (3d) 193 (S.C.C.). See n. 87 *supra* for the text of s. 489.

[125] Most of the confusion was finally resolved by the Supreme Court's Judgement in *McKibbon*. See ibid.

[126] *R. v. Alward* (1976) 32 C.C.C. (2d) 416 at p. 428 (N.B.C.A.) The Court of Appeal's decision was affirmed by the Supreme Court of Canada. See [1978] 1 S.C.R. 559.

[127] *R. v. Dwyer* (1976) 38 C.R.N.S. 129.

From Whom May Crown Prosecutors Receive Their Instructions?

In *Harrison*[128] the Supreme Court of Canada was called upon to decide who it was that could authorize a Crown Prosecutor to perform certain functions on behalf of the Attorney General. The brief facts in *Harrison* were that an official described only as the Director of Criminal Law for British Columbia, wrote a letter to an agent directing him on behalf of the Attorney General to initiate appeal proceedings against the accused.[129] Counsel for the accused challenged the authority of the agent to bring the appeal because the Attorney General had not personally authorized the agent to take the proceedings. The Supreme Court, guided by the English Court of Appeal's decision in *Carltona*,[130] held that under the conditions of modern government, it is to be presumed that a Minister entrusted with discretionary powers, will delegate some of those powers to his or her deputies and that it would be expected that these deputies, for whose decisions the minister was responsible, would be persons of competence and experience.[131] The Court said that although there is a general rule of construction in law that a person endowed with a discretionary power should exercise it personally, that rule could be displaced "by the language scope or object of a particular administrative scheme."[132] It is important to note that in *Harrison*, the question of whether the Director of Criminal Law was properly authorized to exercise authority on behalf of the Attorney General under the *Criminal Code* or relevant provincial legislation was not an issue before the Court. The question at issue was whether the Attorney General had to personally authorize his agent to institute the appeal proceedings, and not whether the Attorney General could lawfully delegate his authority under the *Criminal Code* to the Director of Criminal Law.[133]

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[128] *R. v. Harrison* [1977] 1 S.C.R. 238 (1976) 28 C.C.C. (2d) 279, all page references are to the report in the *Canadian Criminal Cases*.

[129] Idem.

[130] *CarltonaLtd. v. Commissioners of Works*, [1943] 2 All E. R. 560(C.A.)

[131] *R. v. Harrison* [1977] 1 S.C.R. 238 (1976) 28 C.C.C. (2d) 279 at p. 285.

[132] Ibid., p. 284; this rule is known as *delegatus non potest delegare*, meaning a person to whom power has been delegated, cannot further delegate it to another.

It had been assumed without discussion by the Court or the parties to the appeal that the Director of Criminal Law was lawfully appointed to carry out the duties assigned to him.[134] Having made that assumption, and having determined that the Attorney General could delegate some of his *administrative* responsibilities, the Court said: "in the normal course, when a counsel states he is acting with the authority of the Attorney General [it will be presumed] he is indeed clothed with that authority."[135] The Court suggested that if objection were taken to the agent's authority, it would normally be sufficient if counsel for the Crown produced a letter which had been received from the Attorney General or Deputy or other officer who had the requisite authority to instruct the counsel in the particular matter.

In *Harrison* the Supreme Court did not consider or decide whether the decision made by the Director of Criminal Law was a ministerial or an administrative one.[136] In the absence of argument on that point, the Court's bald statement that for the purposes of the *Criminal Code* definition of "Attorney General",[137] the words "lawful deputy" included persons other than the Deputy Attorney General, was clearly obiter.[138] It is emphasized that the only question the Supreme Court was asked to decide in *Harrison* was how and by whom may a Crown prosecutor be instructed to act on behalf of the Attorney General? The Court's reply was that properly authorized deputies may do so through written instruction to the counsel prosecuting that particular case for the Crown.[139]

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[133] Idem.

[134] Ibid.,p. 285.

[135] Ibid., pp. 285–286.

[136] See ibid., p. 285.

[137] "Attorney General" means the Attorney General or Solicitor general of a province in which proceedings to which this Act applies are taken and…except for the purposes of subsection 505(4) and 507(3), includes the lawful deputy of the said Attorney General, Solicitor General and Attorney General of Canada; *Criminal Code* 1953–54, c. 51, s. 2.

[138] *R. v. Harrison* [1977] 1 S.C.R. 238 (1976) 28 C.C.C. (2d) 279 at p. 285. The actions of the Director of Criminal Law were, until challenged, covered by the maxim, *omnia praesumun tar rita esse acta sunt* (all acts are presumed to have been done rightly). See *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240, 243 (Alta.C.A).

What Prosecutorial Authority May be Delegated by the Attorney General

The Supreme Court's decision in *Harrison* settled the question of the Attorney General's ability to delegate certain aspects of his ministerial discretion to other officials in his Department. What it did not settle was the kind of discretionary powers he was entitled to delegate. The question remained—could the Attorney General delegate his *ministerial* responsibilities as distinct from his *administrative* responsibilities? If he could, to whom and by what authority could he do so?

That question was taken up by the Alberta Court of Appeal in *Horne & Pitfield Foods Ltd.*[140] The issue before the Court was whether an "acting Deputy Attorney General", properly appointed under provincial legislation, could give consent on behalf of the Attorney General of Alberta to prosecute under the Lord's Day Act.[141] As a starting point the Court of Appeal considered the purpose or intent of legislative provisions which required the Attorney General's consent before such a prosecution could be taken.[142] That purpose was found to be correctly stated in the English Court of Appeal's judgement in *R. v. Bray*.[143]

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[139] *R. v. Harrison* (1976) 28 C.C.C. (2d) 279 at p. 284–286.

[140] *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. 240, (1983) 39 A.R. 428.

[141] Ibid., p. 242. The Lord's Day Act provided that the consent of the Provincial Attorney General must be obtained before a prosecution could be commenced. See c. L–13, s. 16, R.S.C. 1970.

[142] Ibid., p. 241–243.

[143] (1862) 122 E.R. 96 (C.A.).

In *Bray*, Chief Justice Cockburn, speaking for the Court, held that the sole purpose of such legislative enactments was "to prevent the abuse of the right of prosecution, by proceedings instituted either vexatiously or from corrupt or sinister motives."[144] In 1881, the Supreme Court of Canada adopted Cockburn's judgement from *Bray* in its decision in *Abrahams*.[145] In that case the Supreme Court found that decisions made by the Attorney General concerning criminal prosecutions, were "in the nature of a judicial function" in the exercise of which the Attorney General was to personally and judicially decide whether a charge or indictment is a proper matter to bring before the court.[146] Thirty years later, in *Re: The Criminal Code,* the Supreme Court of Canada specifically adopted its earlier decision in *Abrahams* as being a correct statement of the law.[147]

Following its review of *Bray* and the subsequent Supreme Court decisions concerning legislative provisions requiring the Attorney Generals consent, the Court of Appeal in *Horne & Pitfield*, turned its attention to the central issue before it—the Attorney General's authority to delegate his ministerial powers.

Who May be a Lawful Deputy?

The Court of Appeal found the words, "lawful deputy" as they are used in the *Criminal Code*,[148] were not "to be understood to permit the Attorney General to delegate his power to anybody, or even anybody permitted by provincial legislation."[149] This statement of the law did not, on first impression, seem to be in accord with the Supreme Court's decision in *Harrison*. When discussing that judgement, Kerans J., speaking for a unanimous Court, observed: "I note that the Supreme Court has recently said that a delegation of *administrative* duties by a Minister is to be expected in this age...But the limits of that rule must be recognized."[150] Kerans J. pointed out that in *Re: The Criminal Code* [151] "Mr. Justice Anglin described the fiat power (and the power to prefer a direct indictment) as *quasi*–judicial, *not* administrative. The decision to grant or withhold access to the courts is not a mere administrative act."[152]

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[144] Ibid., p. 98.

[145] (1881) 6 S.C.R. 10 at p. 16.

[146] Idem.

[147] [1910] 16 C.C.C. 459 at 465. *Re: The Criminal Code* has been discussed *supra*, see "Criminal Code Prosecutions By Agents of the Attorney General."

[148] See the definition of Attorney General in the *Criminal Code* s. 2 c. C-34 R.S.C. 1970, which states that concerning proceedings to which the *Code* applies the words "Attorney General" means the Attorney General or Solicitor General of the province in which such proceedings are taken and includes his lawful deputy.

In *Horne & Pitfield* the Court said that a clear distinction is to be drawn between purely administrative acts and ministerial ones. Such a "distinction is important because it preserves the notion of ministerial responsibility" when dealing with the question of ministerial authority.[153] Kerans J. found that the Attorney General must *personally* discharge his ministerial as distinct from his administrative functions and his ministerial functions must not be delegated, because, "this power is of such a nature—so personal and so discretionary that nothing but specific legislation, unmistakably applicable can justify its delegation."[154]

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[149] *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240 at p. 242 (Alta. C.A.).

[150] Idem.

[151] [1910], 16 C.C.C. 459.

[152] *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240 at p. 242.

[153] Ibid. and see De Smith, S.A. *Judicial Review of Administrative Action*, Evans, J.M. (ed.) London, (Stevens & Sons, 1980), pp. 307–308.

[154] As quoted by Kerans J. in *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240 at p. 242 from the judgement of Anglin J. in *Re: The Criminal Code* [1910] 43 S.C.R. 434, 16 C.C.C. 459, at p. 465.

Having reached that conclusion, the Court of Appeal next turned its attention to the extent of the authority of Alberta's Deputy Attorney General, who is appointed to office not by the Attorney General, but according to the provisions of provincial legislation.[155] In reviewing the relevant provincial legislation establishing the office of Deputy Attorney General, the Court found it wanting in several important respects. In the opinion of the Court, of prime importance was the fact that the legislation was designed to appoint a deputy who would relieve the Attorney General of certain of his administrative responsibilities, not his ministerial ones.[156] Thus it was the view of the Court that as the office was presently constituted, the Deputy Attorney General could not exercise ministerial discretion on behalf of the Attorney General. In concluding his judgement Mr. Justice Kerans said that arguably, " 'lawful deputy' [as referred to by the Supreme Court in *Harrison*] can only be another person of Cabinet rank to whom the Attorney General might delegate his duties. It should be remembered that the exercise of the power in question is beyond judicial review."[157]

The Court of Appeal's decision in *Horne & Pitfield* placed considerable doubt upon the status of local Crown prosecutors (as well as others such as Deputy Attorneys General and subordinate officials) to act on behalf of the Attorney General. This uncertainty was accentuated by an earlier decision of the Saskatchewan Court of Appeal in *R. v. McKay* which was to the opposite effect of *Horne & Pitfield*.[158] In *McKay*, Culliton, C.J.S., following the reasoning of the Supreme Court in *Harrison*, held that an agent of the Attorney General, whose position as agent is not challenged, is vested with all the powers necessary and incidental to the discharge of his duties, including that of directing a stay of proceedings. However it must be noted that in *McKay*, it was not disclosed as to whether the agent had specific instructions from the Attorney General to act as agent in the case concerned. That issue was not examined by Chief Justice Culliton, who in effect, equated the agent of the Attorney General to a "lawful deputy" as used in the *Criminal Code*. That was done without first determining the general question of the agents authority to act at all.[159]

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[155] See *R. v. Horne & Pitfield Foods Ltd.* ibid., p. 243ff and see The Department of The Attorney General Act, c. D–13 s. 3 R.S.A. 1980.

[156] Idem.

[157] *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240 at p. 244. The immunity, adverted to by Kerans J. was as a result of the historical and time honoured political accountability of the Attorney General for his ministerial acts, to the legislature, rather than to the Courts. See *R. v. Allen* (1862) 121 E.R. 929 at p. 931, and *R. v. Gouriet v. Union of Post Office Workers* [1977] 3 All E.R. 70.

[158] (1979) 9 C.R. (3d) 378 (Sask.C.A.).

The Alberta Court of Appeal's decision in *Horne & Pitfield Foods Ltd.* was appealed by the Crown to the Supreme Court of Canada. On April 24, 1985 having found no error in the judgement, the Supreme Court affirmed the decision and dismissed the appeal.[160]

Conclusion

Following a committal to stand trial by a Provincial Court Judge, it is normal for the Crown Prosecutor to file an Indictment with the Court which is to hear the case.[161] The filing of the Indictment by a prosecutor is but an administrative act and the Indictment "is not actually 'preferred' against an accused until it is lodged with the trial Court at the opening of the accused's trial, with a Court ready to proceed with the trial".[162] This constitutes the beginning of the trial and combines the separate steps of preferral and presentment which were formerly part of the grand jury procedure.[163]

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[159] See s. 2 c. C-34 R.S.C. 1970. In so doing, Culliton, C.J.S. cited no authority for that proposition.

[160] [1985] 1 S.C.R. 364.

[161] Interview with Neil McCrank, *supra* n. 3 and see the comments of Dickson J. on behalf of the Supreme Court in *R. v. Chabot* [1980] S.C.R. 985, (1980) 55 C.C.C. (2d) 385, at p. 395; all page references are to the report in the *Canadian Criminal Cases*.

[162] Ibid., p. 396

It is at this juncture of the trial proceeding that the question arises as to who may "prefer" the Indictment. In Alberta only two categories of persons may prefer indictments pursuant to the *Criminal Code*, private citizens or the Attorney General and his lawful deputy. The prosecutorial authority of the Attorney General is governed by the Department of the Attorney General Act [164] in combination with the *Criminal Code*, whereas that of a private citizen is governed entirely by the *Code*.

To the extent that Section 2(e) of the Department of the Attorney General Act,[165] purports to confer upon the Provincial Attorney General, the prerogatives of the Attorney General of England, it must be understood that, concerning criminal prosecutions, the English Attorney General's powers were very narrow. As was seen in Chapters III and IV, neither the Attorney General of England or his staff, were ever involved with routine criminal prosecutions, nor could the Attorney General delegate his common law prerogatives of office to others.[166] By the common law, those could only be exercised by him personally or by a representative personally instructed by him.[167] For all indictable crimes, the English Attorney General was subject to the same procedure as a private prosecutor and it was only with respect to the prosecution of grave misdemeanours (indictable but non–capital offences) that the Attorney General enjoyed a special prerogative.[168]

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[163] Ibid., pp. 389-396. Dickson J. points out that in Canada in the days of the Grand Jury, "anyone, including the Attorney General, could prefer a bill of indictment before the Grand Jury." The Grand Jury would hear evidence from the witnesses whose names were endorsed on the back of the indictment. "If the jury found that a prima facia case had been made out, they would return a true bill against the accused, and the foreman would endorse upon the indictment the words 'a true bill'." It was the public return of this bill in open Court that was called the "presentment" of the indictment. The presentment did not include "the step of reading the indictment in the presence of the accused and taking his plea." Presentment was a "unilateral" act on the part of the Grand Jury made in open Court to a judge of the trial court but "not to a Judge constituted with a petit jury to try the case", ibid.

[164] c. D-13 R.S.A. 1980.

[165] Idem.

[166] See Chapter IV *supra*.

[167] Idem.

The modern prosecutorial authority of the Attorney General of Alberta, like that of the private citizen, is derived primarily from the *Criminal Code*. Therefore, any purported authority of an agent of the Provincial Attorney General (for example, a local Crown prosecutor), to prefer an indictment on the Attorney General's behalf, must also be found within the *Code*.

In Alberta, until 1986, that authority was governed by the provisions of s. 507(2), (formerly s. 489), of the *Criminal Code* which stated:

> An indictment under subsection (1) may be preferred by the Attorney General or his agent, or by any person with the written consent of a Judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.[169]

That section did not simply codify the Attorney General's prerogative power to prefer indictments at common law.[170] On the contrary, it expanded his authority, allowing him to prefer an indictment for any offence rather than what might today be considered a misdemeanour.[171] As well, it granted to the Attorney General co-equal authority with the Judges of the Supreme Court of the Province, to grant or withhold permission to prospective prosecutors to prefer indictments. As part of his authority to prosecute under

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[168] At common law the Attorney General, like the private prosecutor, was subject to the Grand Jury procedure for prosecutions by indictment a rule which developed out of *Magna Carta*. The Attorney General could only prefer charges directly before a trial court (*ex officio* informations), if the offence was a misdemeanour. In Canada the distinction between misdemeanours and felonies was abolished by s. 535 of the 1892 *Code*. See Chapter IV *supra*; see also the judgement of Lamer J. in *R. v. McKibbon* (1984) 38 C.R. (3d) 305, at p. 326, (S.C.C.) and see n. 106 *supra*.

[169] c. C-34, R.S.C. 1970 as amended.

[170] See n. 168 *supra*.

[171] Idem.

s. 507, the Attorney General could appoint agents to prosecute indictments on his behalf - a power which the Attorney General always had by the common law.[172]

As outlined above, Canadian courts have consistently found that agents of the Attorney General are required to be specifically instructed for each case they prefer and prosecute by way of indictment. Nothing in the *Criminal Code* indicates or suggests that parliament intended the Attorney General to make a general delegation of his ministerial discretion to local Crown prosecutors, who would then as his agents act without his direction (or that of a lawful deputy), when purporting to prefer and prosecute *Criminal Code* indictments. This view is strengthened by the decision in *Ramawad*,[173] a case decided by the Supreme Court of Canada a year after *Harrision*[174] in which the issue was once again the power of a Minister to delegate his responsibilities. Mr. Justice Pratte, in delivering the judgment of the Court, said:

> Whether such powers exists however or, in other words, whether it may be presumed that the act will be performed not by the Minister but by responsible officers in his Department, will depend on the intent of Parliament as it may be derived from, amongst other things, the language used in the statute as well as the subject-matter of the discretion entrusted to the Minister.[175]

In the matter of the preferring of indictments under Section 507(2) of the *Code*, the Attorney General was given the same discretion to grant or withhold consent to a preferment as was a Superior Court Judge. The fact that the Attorney General's authority to prefer indictments is concurrent with that of the Superior Court, strongly suggests that it is a ministerial or judicial-like function and not simply an administrative one which can be the subject of a general delegation to others who are not "lawful deputies".[176] The granting or withholding of consent to a criminal prosecution has important and far reaching consequences for all of the parties involved and for that reason it has been described as being a "*quasi*-judicial" act.[177] Most would agree that it would be highly irregular and without authority for a Superior Court Judge to have made a general delegation of his or her responsibilities under Section 507 to other non-judicial Court officers such as the Local Registrar or Clerk of the Court. Similarly, it is equally without authority for the Attorney General to make a general delegation of his responsibilities under s. 507 to those who are not his lawful deputies.

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[172] See Chapter IV *supra*, and see s. 2 (j)(vii) Department of The Attorney General Act R.S.A. 1980 c. D-13.

[173] *Ramawad v. Minister of Manpower and Immigration*, (1978) 81 D.L.R. (3d) 687 at p. 687.

[174] *R. v. Harrison* [1977] 1 S.C.R. 238, (1976) 28 C.C.C. (2d).

[175] *Ramawad v. Minister of Manpower and Immigration*, (1978) 81 D.L.R. (3d) 687 at p. 691.

That the Attorney General was not intended by Parliament to make such a delegation of his ministerial authority is clearly seen in the 1985 amendment to s. 507 of the *Criminal Code*.[178] That amendment removed any possible uncertainty by repealing s. 507 and replacing it with s. 504, the relevant parts of which provide that:

> (1) Subject to subsection (3)...the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of
> (a) any charge on which that person was ordered to stand trial, or
> (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial,...
>
> *(3) In any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene, an indictment shall not be preferred under subsection (1) before any court without the written order of a judge of that court.*[179]

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[176] See *R. v. Horne & Pitfield Foods Ltd.* (1982) 69 C.C.C. (2d) 240. (Ont. C.C.) (affirmed on appeal) [1985] 1 S.C.R. 364.

[177] *Re: The Criminal Code* (1881) 6 S.C.R. 10 at p. 16 (S.C.C.). If consent is inappropriately refused an aggrieved citizen is denied the opportunity to establish that a crime has been committed and to have the guilty person punished. As well an accused person is denied the right to clear the air and to have their guilt or innocence established in court. If consent is inappropriately granted, the accused may be put to great expense defending themselves and their liberty placed in jeopardy.

[178] s. 113 c. 19, S.C. 1985. See n. 169 *supra*.

[179] Ibid., emphasis added.

This wording makes it quite clear that unless the Attorney General[180] conducts the prosecution, or intervenes by directing that the particular indictment be preferred and prosecuted on his behalf, the prosecutor, whether public or private, must obtain an order of the judge of the court prior to proceeding. The word "agent", in connection with the Attorney General has been dropped entirely from Part XVII of the *Criminal Code*, the part which deals with the preferring of indictments.[181]

As stated above, the Department of the Attorney General employs over 140 full-time Crown counsel who are appointed as agents of the Attorney General, and who conduct most of the indictable *Criminal Code* prosecutions in Alberta.[182] In the great majority of these prosecutions, the Attorney General has not, nor has his lawful deputy, directed their attention to or given instructions concerning these prosecutions.[183]

In Alberta, as with most other Western Canadian jurisdictions, the public prosecution system is based upon the model developed in Upper Canada in the late

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[180] The Attorney General's lawful deputy is also included by virtue of the definition of "Attorney General" in s. 2 of the *Code*.

[181] See n. 117 *supra* concerning the use of the word "agent".

[182] This information was provided by Mr. Neil McCrank and Mr. Del Perras, nn. 3 and 4 *supra*. Some *Criminal Code* prosecutions are conducted by fee-for-service agents of the Attorney General, appointed on a case-by-case basis.

[183] Ibid. In each local Crown prosecution office there is a hierarchy of authority. At the base level are Crown counsel who are not appointed as agents of the Attorney General. Next are Crown prosecutors who are agents, then assistant chief prosecutors and finally the chief prosecutor for the city or judicial district. In the great majority of cases (over 80%) the only guidance given to the local Crown prosecutors concerning particular files is that of the chief Crown prosecutor for the area, who is to hold regular meetings with his staff to discuss problems and policy. The various Chief crown prosecutors for Alberta meet monthly with the Director of the Criminal Law Division who in turn meets on at least a bi-weekly basis with the Associate Deputy Attorney General. If any prosecution requires particular direction it can be discussed at one or several levels of authority. However, for the most part particular indictments are not discussed beyond the level of the local chief prosecutor. In practice, in most areas, the chief prosecutor discusses indictments with the local Crown prosecutors before they are preferred in court. Relatively few of these are ever discussed by or brought to the attention of the Attorney General or his deputy. In Alberta there is no reporting system in place which would permit the Attorney General or Deputy Attorney General to review and give direction to the many *Criminal Code* prosecutions by indictment taking place across the province. At one time reports on each prosecution went to the office of the Assistant Deputy Attorney General, now they are directed to the office of the chief Crown prosecutor for the jurisdiction concerned. Ibid.

1850's.[184] Central to the scheme is the local Crown prosecutor who conducts the vast majority of *Criminal Code* prosecutions in the various judicial centres across the province. The office of the local Crown prosecutor as found in Alberta is a Canadian hybrid composed of elements of the Scottish procurator-fiscal, the British private prosecutor and the Upper-Canadian County Crown Attorney; but, it is an incomplete hybrid. It lacks the specific legislation required to authorize the local Crown prosecutor to act in the capacity of a public prosecutor.[185]

As a result of the decision in *Horne & Pitfield Ltd.*, it is now clear that in Alberta when dealing with the provisions of s. 504 of the *Criminal Code* [186] concerning the preferment of indictments, a Crown Prosecutor who wishes to prosecute an indictable *Criminal Code* offence, is in no better position than a private prosecutor wishing to do the same thing.[187] Each requires proper authorization (under the provisions of s. 507) prior to preferring and prosecuting an indictable offence. A Crown prosecutor, without specific authorization from the Attorney General to prosecute a particular offence, is in law a private prosecutor, there being no specific legislation which makes him otherwise. Without such legislation, and in the absence of specific directions from the Attorney General, full-time Crown prosecutors when purporting to prefer and prosecute *Criminal Code* indictments are doing so without authority.

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[184] See Chapter VI and see the preceding note.

[185] See n. 8 *supra* for examples of provincial legislation that deal with Crown prosecutors and the authority they are to exercise as agents of the Attorney General.

[186] This was formerly s. 489 and was renumbered as s. 507 in 1975, see c. 93 s. 63 S.C. 1974–75–76. Section 507 stated:

> In the province...of Alberta...it is not necessary to prefer a bill of indictment before a grand jury, but it is sufficient if the trial of an accused is commenced by an indictment in writing setting forth the offence with which he is charged.
> (2) An indictment under subsection (1) may be preferred by the Attorney General or his agent, or by any person with the written consent of a judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.
> (3) Notwithstanding anything in this section, where (a) a preliminary inquiry has not been held, or (b) a preliminary inquiry has been held and the accused has been discharged,an indictment under subsection (1) shall not be preferred except with the written consent of a judge of the court, or by the Attorney General.

The Criminal Law Amendment Act, 1985, c. 19, ss. 113 and 115 re–enacted or replaced the *Criminal Code* provisions concerning the preferring of indictments. These new sections proclaimed in force on Dec. 4th, 1985, are as follows:

> 504. (1) Subject to subsection (3) and section 507, the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of
> (a) any charge on which that person was ordered to stand trial, or
> (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial,whether or not the charges were included in one information.
> (2) An indictment preferred under subsection (1) may, if the accused consents, include any charge that is not referred to in paragraph (1)(a) or (b), and the offence charged may be dealt with, tried and determined and punished in all respects as if it were an offence in respect of which the accused had been ordered to stand trial, but if the offence was committed wholly in a province other than that in which the accused is before the court, subsection 434(3) applies.
> (3) In any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney general does not intervene, an indictment shall not be preferred under subsection (1) before any court without the written order of a judge of that court.

(con't)

There are obviously two solutions to this dilemma. The first is for the Attorney General to become directly involved in the decision making process concerning criminal prosecutions by indictment. That solution, as well as being politically unacceptable, would be contrary to the recommendations made in the *Irving Report*.[188]

The second solution would embody the other major recommendation of the Irving Report or a scheme similar to it.[189] This was to establish a Director of Public Prosecutions

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507. In any prosecution,
(a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or
(b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not
be laid before any court without,
(c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or
(d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court.

[187] See *R. v. Hull* (1982) 20 Alta. L.R. (2d) 333 (Q.B.) and *R. v. Higham* (1970) 1 C.C.C. (2d) 185 (Sask.Q.B.). In both cases, the agent of the Attorney General had applied under s. 489(3) (renumbered s. 507(3) in 1975) to a judge of the court for permission to prefer an indictment. In each case, there had been a preliminary inquiry and the accused had been discharged. On both applications, the agents for the Attorney General argued that the magistrate had erred at the inquiry in discharging the accused, and in each case the Judge hearing the application refused it as there was nothing before the court which would persuade it to depart from the procedure set out under 489(2); that is, that the accused should first be committed to stand trial before an indictment can be preferred.

[188] See Chapter I, p. 4 *supra*.

[189] Idem.

who would be responsible for all Crown Prosecutions in the province and who would be answerable directly to the Attorney General. Working models of such a scheme have recently been introduced into both England,[190] and Australia.[191]

A legal hiatus concerning Criminal Code prosecutions now exists in Alberta, a problem which, while not detected by the Irving committee, lends all the more urgency to its recommendations. Alternatively legislation which defines the authority of the local Crown prosecutor is required.

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[190] See the Prosecution of Offences Act 1985, Law Reports Statutes, 1985.

[191] See the Director of Public Prosecutions Act 1983, Acts of the Parliament, Commonwealth of Australia, No. 113 (1983).

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